SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated December 3, 1974, docketed February 3, 1975.

Opinions Below

The opinion of the District Court of the Southern District of New York is reported at 372 F. Supp. 859. It is printed in Appendix A hereto. Judgment of the District Court is printed in Appendix B.

The opinion of the Court of Appeals as modified is reported at 507 F 2nd 68. It is printed in Appendix C hereto. The order of the Court of Appeals modifying its opinion on rehearing is printed at Appendix D hereto.

The order of the Court of Appeals denying rehearing in banc is printed at Appendix E hereto.

Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the Judiciary Act 28 U.S.C. Sec. 1333.

The judgment of the Court of Appeals for the Second Circuit was made December 3, 1974 and docketed February 3, 1975 (printed at Appendix F hereto). The order of the Court of Appeals modifying its decision on rehearing was made and entered December 20, 1974. The order of the Court of Appeals denying petitioners' application for a rehearing in banc was made and entered January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

In Re Weyerhaeuser.

1. Does a carrier guilty of gross negligence or wilful misconduct in providing a known unseaworthy vessel nevertheless enjoy the protection of limitation clauses in the contract of carriage and in the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) ("COGSA")?

2. Does a common carrier who misrepresents to the shipper that his vessel is seaworthy and that he has exercised due diligence to make it so have a limitation of liability under the Carriage of Goods by Sea Act for resulting cargo damage?

3. If questions #1 and #2 are answered in the affirmative, does § 1304(5) of the COGSA (as interpreted) vio-

late petitioners' rights under Amendment V of the United States Constitution?

4. Does a common carrier who wilfully fails to preserve cargo from damage during the voyage have a limitation of liability under the COGSA?

IN RE NEW YORK NAVIGATION.

5. Does the ruling by the Supreme Court in *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 US 297, 79 S Ct. 766, 3 L.Ed. 2d 820 that COGSA applies only to the carrier bind the lower Federal Courts?

Statutes Involved

Amendment V, United States Constitution	See	Appendix	G
28 U.S.C. § 1254(1)	"	"	"
28 U.S.C. § 1333	"	"	"
46 U.S.C. § 1301(a) (b)	"	"	"
46 U.S.C. § 1302	"	"	"
46 U.S.C. § 1303(8)	"	"	"
46 U.S.C. § 1304(1),(5)	"	"	"
New York Uniform Commercial Code § 7-309	"	"	"

Statement

Invoking the admiralty and maritime jurisdiction of the United States, petitioners, Iligan Steel Mills, Inc., et al ("Iligan") instituted suit in the Southern District of New York against New York Navigation Company, Inc., ("New York Navigation"), the charterer of the SS John Weyerhaeuser, and Weyerhaeuser Company ("Weyerhaeuser"), her owner and the carrier involved, for seawater damage to Iligan's cargo, occurring during a voyage from Baltimore to the Philippines. The damage was approximately $2,200,000.00.

Iligan required ships to transport its steel mill to the Philippines. On July 11, 1966 it and New York Navigation entered into a contract of affreightment (App. 1)* whereby the latter agreed to "provide . . . suitable and seaworthy vessels . . .".

This express warranty is the first sentence of Clause 1 of the agreement. Clauses 2 through 10 cover freight rates and other technical details. Clause 11 reads in part:

> "*In all other respects the loading and transportation* herein shall be performed in accordance with New York Navigation's standard bill of lading. . . ." (Emphasis supplied)

Both Courts below ignored the clear intention of the parties that the bill of lading or Carriage of Goods by Sea Act were not to bear upon the express warranty of seaworthiness.

The Master was to sign bills of lading; The United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* ("COGSA") was to apply to the "carrier"; but the contract of July 11, 1966 itself was to be governed by New York law.

The first ship provided was the SS John Weyerhaeuser, owned by Weyerhaeuser, which issued the bill of lading on December 16, 1966. The bill of lading provided that it was a contract only with the shipowner and New York Navigation was to have no responsibilities thereunder and it contained a definition of carrier which excluded New York Navigation. Petitioners' cargo was loaded on or about December 16, 1966, at which time the ship was already unseaworthy and leaking. Respondent Weyerhaeuser built a temporary wooden non-watertight bulkhead between holds #2 and #3 in anticipation of the loading at Tampa of a full load of fertilizer into hold #3.

Both Courts below found that the cause of the cargo damage was "a massive entry of water into the ship's #3

* Exhibit Volume.

hold, which slowly permeated the fertilizer [stowed in that hold], and formed a slurry, and finally burst through the [temporary] non-watertight bulkhead into the #2 hold inundating and destroying the Iligan cargo". 372 F. Supp., at p. 863.

The entry of seawater was due to a long-standing defect in a soil pipe which exited through the ship's hull after passing through the cargo hold. "The [valve] lugs were completely corroded with rust, so that the valve was frozen in an open position, and the sanitary line pipe was corroded through with a hole approximately 2" by ¼"", (507 F. 2d 69, 70) through which the sea entered the cargo hold.

Both lower Courts found that the Master of the ship knew of the leak three voyages before the "Iligan" voyage; that he reported it to Weyerhaeuser's marine superintendent in October, 1966, so the carrier's shoreside owners had notice of "excessive water entry" into hold #3 *two months prior to the relevant voyage.* (372 F. Supp., at p. 865).

There is a serious inconsistency in the findings of fact of the lower Courts. On the one hand, it was found that "the signals were sufficiently clear to put the owner on notice that there was some problem with water entry"; that it was an "unusual problem"; that the owner "had notice of the problem of excessive water entry" (372 F. Supp. at pp. 865, 868) and at Cristobal, the ship was "clearly unseaworthy" and "taking on significant quantities of water" and the master's explanations at that time were "wholly implausible" (372; F. Supp. at p. 865). "In Baltimore for several days, the bilge readings were abnormally high" (372 F. Supp. at p. 863).

On the other hand, the lower Courts held that petitioner "has not proved that Weyerhaeuser knew or must have

known of the unseaworthy condition of the ship" because the master did not have knowledge of the "actual defect" (372 F. Supp. at 865).

Although it had expressly warranted the ship would be seaworthy and was subject to an implied warranty as well, New York Navigation did nothing to provide a seaworthy ship but delegated its duty to Weyerhaeuser.

Weyerhaeuser remained silent about the defect, never advised Iligan and never repaired it. The Master and Mr. Best, Iligan's representative, met at Baltimore on the ship's bridge. There was not a word about the leak (App. 117a, 118). Iligan's cargo was loaded into a hold certain to flood (App. 555a). Best would not have accepted the ship had he known the truth (App. 117a, 118a).

The ship was delayed at Cristobal for 16 days. The Master knew then the ship was "clearly unseaworthy" as significant quantities of seawater were entering #3 hold. No. 2 hold was still dry and Iligan's cargo could have been preserved if it had simply been discharged at that port. But still nothing was done.

The District Court held that Weyerhaeuser's failure to locate and correct the defect was a simple failure of due diligence, and held it liable to Iligan but only for $500.00 per package under § 1304(5) of the United States Carriage of Goods by Sea Act.*

As for New York Navigation the District Court held it had breached its express warranty of unseaworthiness but since it had incorporated by reference the United States

* The trial was held before Honorable Edward C. McLean, who died shortly after receiving post-trial briefs. Honorable Robert J. Ward, by stipulation, decided the case on the record.

Carriage of Goods by Sea Act, 46 USC § 1300, *et seq.* in its contract with Iligan it was liable only for $500.00 per package. It held COGSA did not apply by law to New York Navigation but that it had been incorporated although Weyerhaeuser was the carrier, and not New York Navigation.*

The lower Court held that a breach of an express warranty to supply seaworthy ships did not nullify the contract. But if it did, petitioner had to treat the entire contract as void, or else the terms of the contract were not voided.

But this was a comprehensive contract which envisioned the issuance of many different bills of lading as different vessels were provided for different parts of the steel mill. Each new bill of lading became part of the contract and each new ship became subject to new warranties. Under New York law which governed the agreement, it was severable. *Riply* v. *International Railways of Central America and United Fruit Co.*, (1960) 8 NY 2d 430, 209 N.Y.S. 2d 289, 171 N.E. 2d 443.

Petitioner does not seek to nullify selected terms of the contract, as the lower Court held, but simply argues that the commercial purpose of an entire divisible part of a severable contract has been frustrated by New York Navigation's fundamental breach of that part.**

The District Court also held that New York Navigation, which did not even inspect the ship, had exercised due diligence by delegating its duty to Weyerhaeuser.

The Second Circut affirmed the District Court's judgment and went further by holding that the concept of

* The bill of lading stipulated New York Navigation had no duties under it and it was not the carrier.

** Article 16 of the agreement stipulates that performance under it shall continue in the event of arbitration of a dispute. Therefore, the parties meant it to be divisible.

deviation set forth in *The Willdomino* (1927) 272 U.S. 718, S. Ct. 261, 71 L. Ed. 491 and *St. Johns N.F. Shipping Corp.* v *S. A. Compagnia Geral Commercial* (1923) 263 U.S. 119, 44 S. Ct. 30, 68 L. Ed. 201, would not be applied to any other breach of contract by a common carrier; that no matter how the carrier causes cargo damage, either through gross negligence or even wilfully, it is liable only for $500.00 per package. Because of prior Supreme Court decisions it reluctantly allows that a geographical deviation or wrongfully stowing the cargo on deck, will void the contract of carriage, *but nothing else.*

It affirmed the judgment against New York Navigation; limited to $500.00 per package, without opinion.

28 U.S.C.A. § 2403 may be applicable.

Reasons for Granting the Writ

1. The Court of Appeals has not followed the rulings of this Court and the House of Lords that a carrier's gross negligence or wilful misconduct will void its contract and is a valid concept in the law. *The Willdomino* (1927) 272 U.S. 718 47 S. Ct. 261, 71 L. Ed. 491; *The Malcolm Baxter, Jr.* (1928) 277 U.S. 323, 48 S. Ct. 516, 72 L. Ed. 901; *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker (A/B)* [1949]A. C. 196.

2. The Court of Appeals has granted a limitation of liability to a carrier whose bill of lading was based upon a misrepresentation (by failure to speak) as to the seaworthiness of his vessel and his exercise of due diligence.

3. The Court of Appeals has not followed the ruling of this Court that a carrier who wilfully exposes the goods to a greater risk than has been agreed becomes liable as for a deviation and cannot escape by reason of any limitation of liability in its contract.

4. The Court of Appeals has granted a statutory limitation of liability to a carrier who wilfully failed to preserve the cargo from inevitable damage during the voyage.

5. By giving Weyerhaeuser the benefit of § 1304(5) of the United States Carriage of Goods by Sea Act, under the facts herein, the Court of Appeals has violated Iligan's rights under Amendment V of the United States Constitution.

6. The Court of Appeals has not followed the ruling of this Court that the United States Carriage of Goods by Sea Act applies only to carriers.

7. The questions presented are of wide international concern to and a subject of serious disagreement in the shipping industry.

1. In *The Willdomino* (1927) 272 U.S. 718, (supra) a ship left port with an inadequate supply of coal, known to be so by the carrier, and this necessitated a departure from her course. During the deviation the ship struck a reef or a submerged object which caused seawater damage to the cargo. This Court held that the unseaworthiness was the cause of the damage and since it was known to the carrier at the time of shipment the contract had to fall.

In *The Malcolm Baxter, Jr.*, (1928) 277 U.S. 323, (supra), a schooner developed leaks at sea from a cause existing at the port of departure, which the carrier failed to discover from a lack of due diligence. This necessitated her putting into a port of refuge. While there, an embargo frustrated the planned voyage. The Court found that the facts of the case distinguished it from *The Willdomino* and that the holding of *The Willdomino* case was not applicable. The Court held that while the carrier would be responsible for its failure to discover the unseaworthy condition the facts demonstrated that its neglect was not of a sufficient

degree of culpability to warrant displacement of the contract; the carrier was therefore permitted to recover its freight. The Court did point out at page 331 however:

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by it."

In dealing with the damage caused by the embargo, the Court noted at 334:

> "There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or consequent delay would bring the vessel within its operation".

This quote is extensively discussed by the House of Lords in *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker (A/B)* [1949] A.C. 196.

In that case plaintiff chartered defendant's British vessel to carry soybeans from Manchuria to Sweden. Because of delay caused by unseaworthiness, the vessel was at sea when war broke out between England and Germany. The ship came under Admiralty orders and had to discharge the cargo at Glasgow. Plaintiff sued for the cost of transshipment on a neutral vessel and defendant relied on a war risk clause in the charter party.

The House of Lords agreed with the decision of the Supreme Court of the United States in *The Malcolm Baxter, Jr., supra,* but held it had left open the question whether, if the carrier in that case should have foreseen the embargo, it would have lost its exemptions. It held the carrier should have foreseen the outbreak of war and the contract was therefore displaced.

These cases demonstrate that actual knowledge or knowledge chargeable to the carrier that his ship is unseaworthy is the key factor which strips the carrier of the protection afforded to him by his contract and makes him liable as an insurer. What a shipowner should have known is sufficient to establish his fault or privity, design and neglect in both fire and limitation cases. *The Pocone* (Judge L. Hand), (2 Cir. 1947) 159 F. 2d 661, cert den. (1947) 331 U.S. 836, 67 S. Ct. 1519, 91 L. Ed. 1849.

At pages 664-5 Judge Hand said:

> "The measure in such cases is not what the owner knows, but what he is charged with finding out".

The Court of Appeals took out of context the District Court's finding that Iligan had not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship (372 F. Supp. at p. 865; 507 F. 2d at p. 70). The Court's error is amply demonstrated by the findings of the District Court that Weyerhaeuser's shoreside officers had "notice of the problem of excessive water entry" (372 F. Supp. at p. 868); that "signals were sufficently clear to put the owner on notice that there was some problem with water entry" (372 F. Supp. 865); and that the shipowner's shoreside officers "failed to conduct an adequate inspection to locate and correct the defect" (372 F. Supp. at p. 868). The carrier, therefore, knew that hold #3 was leaking sea water, but never ascertained the exact cause. The circumstances made such discovery imperative. Prior to the voyage in question, while the vessel was at Portland, internal fresh water leaks as well as the ship's plates, were eliminated as possible sources of water entry. Thus, the clapper valve was the most likely cause of sea water entry as this problem was common on old Liberty ships.

The Court of Appeals decision is a flat holding that wilful misconduct or gross negligence will in no event prevent the carrier from limiting liability.

The Court's language 507 F. 2nd at page 70 demonstrates that it was promulgating a policy designed to eliminate once and for all times cargo suits which would require judicial consideration of the degree of culpability of a shipowner. The Court concluded that the determination of gross negligence is too difficult for them to decide, and the Court proposes that it would be preferable instead for cargo insurers rather than the ship's insurers to bear the risk in such cases. In formulating this doctrine, the Court of Appeals has apparently overlooked the fact that the decisions of this Court in *The Willdomino (supra)* and *The Malcolm Baxter (supra)* have set the guidelines for determining the precise question which the Court of Appeals has precluded as an issue from all future cases. In *The Waalhaven* 36 F 2nd 706 (2nd Cir. 1929) cert. denied 281 U.S. 747, 50 S. Ct. 352, 74 L. Ed. 1159, Judge L. Hand speaking for the Court made reference to the holding in *The Willdomino* at page 709:

> "We do not forget that in The Willdomino the Supreme Court added that "gross negligence" might be enough; but this we understand to mean no more than that the facts may be so clear as to compel the inference that the master closed his eyes to them, and knew, though he may not have explicitly acknowledged, that he must change his route. The distinction between this and a deliberate intention seems to us very tenuous."

In *President Arthur*, (S.D.N.Y. 1928) 28 F. 2d 391, the Court followed *The Willdomino (supra)*:

> "The ship left port with bunker coal grossly inadequate for the voyage, and this fact *must have been known* to her responsible officers before sailing. The deviation to Halifax cannot, therefore, be regarded as involuntary. The emergency which required deviation arose either from gross negligence or deliberate intention in failing to take on board sufficient bunker coal for the voyage". (emphasis supplied)

If the Court of Appeals in the present case had followed *The Willdomino (supra)* rather than the rule which it formulated, it is clear that the appellate court could not have sustained the determination of the District Court. Respondent Weyerhaeuser knew that there had been an entry of an excessive amount of water. The District Court relieved the carrier from liability on the theory that its failure to know the exact cause of the water entry was mere negligence. This conclusion is not compatible with the carrier's deliberate or wanton failure to have the ship properly inspected when it had been forwarned of the unseaworthy condition. By removing entirely the question of degree of the carrier's negligence in cases of this nature the Court of Appeals has in effect overruled the decisions of this Court and has thereby given binding effect to an otherwise invalid contract of carriage.

2. The Court of Appeals found that Weyerhaeuser's shoreside officers knew two months before Iligan's cargo was loaded that hold #2 (common to hold #3) which was to contain Iligan's cargo, was suffering "excessive water entry". Yet this information was not relayed to Iligan which was allowed to accept the bill of lading for this unseaworthy ship.

Mr. Best, the shipper's agent, talked to Captain Dumble on the bridge of the SS JOHN WEYERHAEUSER in Baltimore,

before Iligan's cargo was loaded. The water in hold #2 at that time, to the Captain's knowledge, was to the top of the bilges (App. 117a, 118a).

They each knew who the other person was, yet the Captain remained silent (App. 117a, 118a). Nor did Weyerhaeuser's main office contact petitioner to advise it of the condition. Mr. Best testified that if he had known of the leak, he wouldn't have accepted the ship (App. 117a, 118a).

If Iligan had employed the SS JOHN WEYERHAEUSER after learning of its unseaworthiness, its cargo insurance policy would have lapsed. Its "seaworthiness admitted" clause covers only innocent parties and not shippers who have learned of defects.

In accordance with general practice the shipper relies upon the carrier with regard to the condition of the ship. The carrier is fully aware of this reliance. Respondent Weyerhaeuser knew that the shipper Iligan had no knowledge of the water entry.

This failure to speak when there was a duty to speak was tantamount to fraud under the circumstances, 12 Williston on Contracts (3rd Ed.) Sec. 1497 at 380. The Court of Appeals allowed to the carrier a limitation of liability of $500.00 per package. However, COGSA applies only to contracts of carriage. Since there was no true meeting of the minds, this carrier cannot have the benefit of COGSA.

The Court below failed to follow its own ruling in *Oliver Straw Goods Corp.* v. *OSK* (2 Cir. 1931) 47 F. 2d 376. In that case, the carrier issued a bill of lading which falsely stated the goods were on board. As a matter of fact they were still ashore where they were looted following an earthquake. Judge Augustus Hand held on p. 379:

> ". . . to effectuate the valuation clauses through the fiction of estoppel would be to enable the shipowner to profit by its own wrong".

Judge Hand classed the breach of the on-board warranty as a deviation no less fundamental than a deviation in the voyage or on-deck, etc. (p. 380).

From the earliest days of the common law and the general admiralty law a contract obtained by fraud has been void. Cases of constructive fraud lead to the same result, 12 Williston on Contracts (supra) Sec. 1509 at page 455 and quoting at page 456 from *Lehigh Zinc & Iron Co.* v. *Bamford* (1893) 150 U.S. 665.

3. The Court of Appeals has refused to follow the ruling of this Court in *St. Johns N.F. Shipping Corp.* v. *S.A. Compania Geral Commercial* (1923) 263 U.S. 119 44 S. Ct. 30, 68 L. Ed. 201 that a carrier who breaks his contract by exposing the goods to a greater risk than had been agreed does not have the benefit of exculpatory or limiting clauses in that contract.* The ruling of that case is that a carrier may not increase the risk anticipated without being *fully* liable for resultant losses. The Court of Appeals has limited the holding in *St. John* to on-deck deviations. Mr. Justice Mc Reynolds in deciding *St. Johns* cited in support of his ruling *The Sarnia* (2nd Cir. 1921) 278 Fed. 459 cert. den. (1922) 258 U.S. 625.

This Court sets policy for the nation. Its decisions cannot be so narrowly construed as has here been done.

By knowingly stowing Iligan's cargo in a hold which was leaking, Weyerhaeuser knowingly increased the risk of loss. Captain De Bouthillier, Iligan's expert, testified,

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* In St. Johns, the carrier wrongfully stowed goods on-deck, and they had to be jettisoned during a storm.

without contradiction, that the damage was "certain" (App. 556a). This is even more serious than on-deck stowage, which requires heavy seas to damage the cargo.*

It is submitted that the *St. John's* doctrine is not limited to the bare facts of the case but rather sets a policy of broad application. If the decision of the Court of Appeals is permitted to stand, the carrier will be given protection for its wrong doing that this Court has clearly stated it will not sanction.

4. The District Court found that "the ship was clearly unseaworthy in Cristobal", because it "was taking on significant quantities of water which were at that time confined to the #3 hold and the Captain's explanations for the high bilge readings were "wholly implausible" at that time (372 F. Supp. at p. 865). If Iligan's cargo were discharged at that time, it would have been undamaged, but the carrier refused to take any steps at all.

The District Court thought it important that the Master didn't know the "actual defect" in the ship. This cannot be a relevant distinction for it rewards a carrier for its ignorance and is a dangerous message to give shipowners, especially today when ultra-large ships are sailing. In permitting the carrier to escape from its liability for wilfully sacrificing Iligan's property, the lower courts have acquiesced in such misconduct at the expense of petitioners and their decisions will thereby set a dangerous precedent which if not set aside will undoubtedly be followed with equally inequitable results.

5. Iligan's property has been taken by application of the United States Carriage of Goods by Sea Act (46 U.S.C. § 1304(5), as interpreted by the Court of Appeals. The

* The on-deck cargo on the SS JOHN WEYERHAEUSER arrived intact.

Court has granted a statutory limitation of liability to a carrier who wilfully damaged the cargo in its care and fraudulently induced the bill of lading. The constitutional question thus raised is whether the granting of a limitation of liability to such a person is "a denial of fundamental fairness shocking to the universal sense of justice."* If there has been such a denial then petitioners' right to substantive due process under Amendment V of the United States Constitution, has been violated.

That Amendment reads, in part:

> "No person shall be . . . deprived of . . . property, without due process of law; . . .".

There can be no question that the right to recover cargo damages from a tortfeasor either directly or through subrogation is a property right and that a statutory limit to the amount the tortfeasor must pay over is a "deprival" or a "taking" of petitioner's property.

The question before this Court then is whether the granting of the "package limitation" contained in 46 U.S.C. § 1304(5) to respondent Weyerhaeuser where it knew before the voyage that the ship was excessively leaking and failed to repair the leak or to notify the petitioner Iligan, was a denial of substantive due process.

The lower courts have held that COGSA provisions were intended to grant a limitation "in any event"** to respondant Weyerhaeuser. In so doing, they disregarded the purpose of the Act and the objectives which it sought to achieve. This construction allows for an arbitrary, capricious and unreasonable application of the limitation provisions of the Act and thereby thwarts its objective.

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* *Betts* v. *Brady* (1942) 316 U.S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595.

** 46 U.S.C. § 1304(5).

The purpose of 46 U.S.C. § 1304(5) as set out in *The Flying Clipper*, (S.D.N.Y. 1953) 116 F. Supp. 386, 388:

> ". . . was to prevent a stipulated value for cargo in in a lesser amount and to do away with the then current limits imposed by carriers, usually $100 or even a smaller sum."

The idea then was to increase the minimum allowable limitation and was passed for cargoes' benefit.

This purpose is not advanced by the interpretation placed upon § 1304(5) by the Court of Appeals. Rather, the opinion below allows respondent Weyerhaeuser to benefit from its own wrong. At the least it grants a fraudulent carrier benefits not meant for its use.

At a minimum it puts a premium on gross negligence and wilful disregard of a known unseaworthy vessel.

The interpretation which the lower courts have placed on COGSA has resulted in the transfer of property from one private person to another private person as a result of the latter's misrepresentation and/or gross negligence. This cannot be a "public purpose."

6. As held by this Court in *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 U.S. 297, 79 S.C. 766 3 L. Ed. 2d 820, COGSA applies only to carriers. Throughout the Act, Congress refers only to "the carrier".

The bill of lading here (App. 35) expressly made a part of the July 11th contract (App. 1) contains a "demise clause" reading:

> "If the ship is not owned by or chartered by demise to the company designated herein (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect *only as a contract with the owner or demise charterer*, as

> the case may be, as principal, made through the agency of the Company designated herein [New York Navigation] which acts as agent only and shall be *under no personal liability whatsoever* in respect thereof". (emphasis supplied).

It then defines carrier as:

> ". . . the word 'Carrier' shall include the ship, her owner, master, operator, demise charterer, and *if bound hereby* the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee . . .". (App. 35) (emphasis supplied)

Since New York Navigation expressly disavowed any responsibilities under the bill of lading in the demise clause, it, therefore, excluded itself from the definition of carrier, for it was not "bound hereby".

Despite this agreement by the parties, the Circuit Court held that COGSA applied to New York Navigation and the "due diligence" requirement of COGSA § 1303(1) modified its express warranty of seaworthiness (App. 1)* as well as the warranty implied by law to every contract of affreightment. The Court also granted to New York Navigation the benefit of the package limitation contained in COGSA (§ 1304(5)).**

The Court below clearly distorted the terms ot a contract, of a type which is generally employed by maritime contractors throughout the world.

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* Exhibit Volume.

** As a further result of the ruling that COGSA applies to a non-carrier, the Court held the Uniform Commercial Code not applicable although the contract stated New York law was to apply. The Code, § 7-309, forbids any limitation by New York Navigation in this case since its freight rates were not based on value.

As a result the rights and duties of the parties previously predictable, have now become confused and unpredictable.

This Court should clarify whether or not COGSA applies only to the "carrier" or to anyone remotely connected to shipping.

7. The questions in this case, involving fraud, gross negligence, deviation, and the applicability of COGSA to non-carriers are of primary importance to the shipping fraternity.* Petitioners urge this Court to consider these questions since the decision below has created confusion and unpredictability in the maritime industry. The effect of the decision of the Court of Appeals further limits the right of subrogation. By excusing misrepresentation and knowledge of unseaworthiness, even a seaman's rights under the "Jones Act," 46 U.S.C. § 688 may be affected.

The unseaworthiness of a ship is the heart of a contract of carriage. It affects the lives of seamen and passengers as well as the property entrusted to the carrier.

The duties must be clarified. The Second Circuit has, in effect, told shipowners, even of 500,000 ton tankers, that knowledge of unseaworthiness or reckless disregard of cargo's safety does not void their contracts so they retain limitation provisions therein and in COGSA. Even a fundamental breach of contract, with fraudulent overtones, would be protected by COGSA.

Fraud is a moral evil as well as a *malum prohibitum.* To excuse it, as the Second Circuit has done in this case because the cargo was insured, is to reduce good and evil

* The Journal of Commerce (December 6, 1974) calls the decision below a "landmark", because it "will spare ocean carriers from endless litigation in instances where negligence causes loss of cargo".

to the status of operating costs. The lower Court excuses fraud and gross negligence because it is better for cargo insurers to pay.

Section 1303(8) of the COGSA reads, in part:

> "A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability".

Under the same section, such a clause is null and void. But by holding that it is "more practical and economical from the point of view of insurance" for cargo insurers to absorb cargo losses due to the carrier's gross negligence or wilful misconduct rather than to have the carrier's liability insurer respond, (507 F. 2d at p. 73) the Court of Appeals has granted the carrier a benefit it is barred from inserting in the contract.

We know that the Executive and Legislative branches of this Nation have sometimes been compelled for a larger good to take actions which are less than noble. This great Court has never done so. This Court will not reduce moral decisions to cost-benefit analysis.

The New York Times for January 27, 1975 said in an editorial that the "Second Circuit is widely viewed as second in importance to the United States Supreme Court because it is in practice, the Court of last appeal for many consequential cases." The maritime decisions of that Court command wide respect in the shipping industry and among other circuits.

Petitioner believes the Court of Appeals in deciding these "policy" questions, in conflict with decisions of this Court has, in effect, become the Court of last resort, because so few maritime matters are accepted by this Court.

If ceriorari be denied here, *The Willdomino, St. John's* and *Herd & Co.* are, in effect, overruled and shipowners will not spend the money to repair a ship where they will "in any event"* have a limitation of liability.

Petitioners respectfully request that in view of the broad statement of law propounded by the Court of Appeals, and the sweeping effect it intends that its decision will have, this Court settle the critical issues presented, so that the lower Federal Courts will be properly guided and the dangers inherent in the decision averted.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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* Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Opinion

67 Civ. 1137 R. J. W.

ILIGAN INTERNATIONAL CORP. and ILIGAN INTEGRATED STEEL MILLS, INC.,

Plaintiffs,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY and NEW YORK NAVIGATION COMPANY, INC.,

Defendants.

Appearances:

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Appendix A—Opinion of United States District Court dated March 14, 1974

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WARD, D.J.

In this admiralty action, Iligan Integrated Steel Mills, Inc.[1] ("Iligan") seeks to recover approximately $2,200,000 representing the full amount of damage to cargo sustained during a voyage to Iligan City, Republic of the Philippines, in December, 1966.[2]

In July of 1966 Iligan negotiated a contract with defendant New York Navigation Company, Inc. ("New York

1. At the trial Iligan International Corp. was dropped as a plaintiff, and seven named insurance companies were added, as real parties in interest. All of these parties will be referred to in this opinion as "Iligan" or as "plaintiff."

2. The Hon. Edward C. McLean conducted a three and one half day non-jury trial in July, 1972. After his death the case was transferred to me, and the parties stipulated to a decision upon the record of the trial already had, supplemented by a relatively brief oral argument. This was held February 7, 1974.

Navigation") by which the latter agreed to provide ships for the transport of machinery and parts for a steel mill which Iligan was then building in the Philippines. New York Navigation in turn signed a charter party with defendant Weyerhaeuser Company ("Weyerhaeuser") using the New York Produce Exchange Time Charter form, with certain modifications and fifteen added clauses. In this charter party New York Navigation hired Weyerhaeuser's vessel, the defendant ship S.S. JOHN WEYERHAEUSER, for a single voyage from the East Coast of the United States to the Far East. The ship was delivered to New York Navigation at Baltimore, Maryland on December 12, 1966, and the Iligan cargo loaded during the next several days. On December 16, 1965, New York Navigation as agent for the master signed a bill of lading which constitutes the contract between Iligan as shipper and Weyerhaeuser as carrier of the goods.

The steel mill cargo arrived in the Philippines virtually destroyed. Seawater had entered the ship through a leaking clapper valve in an adjacent hold and mixed with a cargo of fertilizer stowed there to form a slurry, which then penetrated the bulkhead separating the two cargoes and inundated Iligan's cargo. Iligan contends that the failure of the owner to discover and repair the unseaworthty condition of the ship prior to this voyage constitutes gross negligence or wilful and wanton misconduct and entitles plaintiff to recover the full value of the destroyed cargo. Plaintiff also seeks to recover the full value of the cargo from the charterer, alleging that New York Navigation breached both an express and an implied absolute warranty of seaworthiness and is not entitled to the benefit of its contract terms limiting the amount of its liability to $500

per package. New York Navigation claims that, if it is found liable to Iligan, Weyerhaeuser is liable over to it, because the charter party contains an express absolute warranty of seaworthiness. Weyerhaeuser defends on two major grounds. First, it contends that it exercised due diligence to provide a seaworthy vessel, and is therefore not liable to Iligan for any damage caused by unseaworthiness of the vessel, under the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et seq.*, ("Cogsa"). Second, it claims that if it is found liable, this liability is limited in amount to $500 per package, as to Iligan by virtue of Cogsa's provisions, and as to New York Navigation by virtue of express contract terms.

The Facts

Certain facts are not in dispute. The vessel is a reconstructed Liberty ship, built in 1944, which Weyerhaeuser, primarily a lumber company, acquired after World War II together with five others, for the purpose of transporting lumber from the West Coast of the United States to the East Coast. Weyerhaeuser commonly chartered these vessels for voyages from the East Coast to the Far East and back to the West Coast, continuing to transport its own lumber aboard them on the coastal voyages. The ship was substantially remodeled and reconditioned by Weyerhaeuser in 1961, at which time it completely rebuilt the crew's quarters, and also removed the permanent, watertight bulkhead separating the #2 and #3 holds, so that lumber could be more conveniently carried. A single set of port and starboard bilge tanks, located in the after end of #3 hold, still served the common hold.

In #3 hold, about twenty-two feet above the bilge tanks on either side, there is a pipe called a sanitary or soil line which drains from the crew's toilets, exits the ship through an opening in the hull, and permits waste to be discharged outside the ship. When the ship is not heavily laden this opening is above the level of the sea; when the ship is loaded it is under water. At the point it exits the ship the pipe makes a sharp right angle. There is a cover plate over the opening of the pipe, called a clapper valve; this rests on lugs and is designed to swing open to allow discharge of waste, but to resist the pressure of the sea and to keep seawater out. The entire apparatus is also referred to in the record as a sanitary valve.

On the voyage in question, New York Navigation constructed a temporary bulkhead of boards and burlap to divide #2 and #3 holds, since it planned to load the Iligan cargo in one and fertilizer in the other. The Iligan cargo was loaded into #2 hold in Baltimore between December 12 and December 16, 1966, in good condition. The ship proceeded to Tampa, Florida, where a cargo of chemical fertilizer was loaded into #3 hold in such a way as to fill the hold completely. The vessel stopped once more, in Cristobal, Panama Canal Zone, for bunkers and engine repairs, before proceeding on the trans-Pacific voyage in mid-January.

Upon the ship's arrival in Moji, Japan, on February 22, 1967, to take on fresh water, it was discovered to be riding much lower in the water than anticipated, so that no additional water could be safely taken on. This led the master to suspect massive abnormal water entry into the ship. His investigation revealed that the entire #2 hold contained the Iligan cargo was flooded. (Two days earlier, he claims, the cargo had been intact.) Further investigation revealed

that the port sanitary valve in #3 hold was leaking, and the master directed that the pipe at this juncture be covered with a cement box. A cement box was installed on the starboard valve as well. The vessel proceeded to Mokpo, Korea, where the fertilizer was unloaded and the cement box on the port valve replaced, and thence to Iligan, where the crew dismantled the sanitary valve. The clapper valve lugs were found to be completely corroded with rust, so that the valve was frozen in an open position, and the sanitary line pipe was corroded through, with a hole approximately 2″ by ¼″. This condition had clearly developed over time. The combined openings had apparently permitted a massive entry of seawater into the #3 hold, which slowly permeated the fertilizer, formed a slurry, and finally burst through the non-watertight bulkhead into the #2 hold, inundating and destroying the Iligan cargo.

The evidence crucial to plaintiff's case is contained in the deck and engine room logs of the Iligan voyage and those immediately prior to it. The ship had carried a cargo of fertilizer from Virginia to Madras, India in July and August of 1966 ("th Madras voyage"), then had sailed to Portland, Oregon ("the return Pacific voyage") in ballast, and had carried lumber from Oregon to Rhode Island in October and November ("the coastal voyage"). On these voyages the crew usually recorded on the bilge readings and the frequency of pumping on a daily basis.

The bilge wells in #3 hold are eighteen inches deep. Plaintiff's expert considered any reading above seven inches to be noteworthy, and pointed out that any reading above eighteen inches meant that there was water in the cargo. Weyerhaeuser's operations manager, whose deposition testimony was introduced at trial, considered consist-

ent readings of as much as thirteen to fifteen inches to indicate a serious problem of water entry.

On the Madras voyage the soundings in the #3 bilges ranged from insignificant levels to fifteen inches. The logs reflect pumping of the #3 bilges on a daily basis. On the return Pacific voyage no soundings were taken, as the ship was proceeding with water ballast in two other holds. The #3 bilges were, however, pumped daily. On the coastal voyage the #3 bilge readings ranged consistently above nine inches, and frequently as high as fifteen to twenty-four inches, but there were no engine room log entries during the latter part of the voyage to reflect the frequency of pumping. (The chief engineer, who apparently was deficient in several respects, left the ship and was replaced in Baltimore.) In Baltimore for several days the bilge readings were abnormally high, as high as eighteen inches, and the bilges were pumped once.

In Tampa, as noted above, a large load of fertilizer was put aboard the ship, completely filling the #3 hold, and making the sanitary valve inaccessible for inspection or repair from that time forward. En route to the Panama Canal the ship experienced engine difficulties which caused it to put in to Cristobal for repairs. At that time it also took on fresh water. In Cristobal, for the first time, the #3 bilge readings consistently exceeded fourteen inches, and frequently reached over twenty inches. The crew then pumped the bilges on an almost daily basis. Iligan charges that from this data the master and the owner had to know that the ship was leaking and unseaworthy.

Weyerhaeuser rebuts this evidence in two ways. It offers specific explanations for each of the instances of high readings which Iligan notes, and points to specific steps the

master took to locate and solve the problem. Beyond this, Weyerhaeuser claims that the ship was routinely and thoroughly inspected and maintained in class, and that the owner cannot be charged with notice of an unseaworthy condition. These facts combined, it claims, demonstrate that it fulfilled its obligation to exercise due diligence to provide a seaworthy vessel.

The master testified that he regarded the bilge readings on the Madras voyage as a problem, and associated the abnormal reads with taking on fresh water. On his return to Portland he claims he reported the difficulty to Weyerhaeuser's marine superintendent. He also consulted with the chief engineer, who assured him, after checking, that there was no possiblity of water entry into the bilges from the fresh water systems. On the coastal voyage he was accustomed to high bilge readings and did not attribute them to water entry, since lumber typically "sweats" as it is carried from a cold to a warm climate and back. He explained the high readings in Baltimore on the basis of a heavy snow which made it impossible to close the hatch cover and also delayed loading of the cargo. A single pumping sufficed to empty the bilge well as that time.

When the master began to note abnormal bilge levels in Cristobal, he once again attributed this to taking on fresh water, despite the chief engineer's assurance that this was not possible. At this time he did not report the problem to the owner. He made what limited inspection was available to him in view of the nature of the cargo in #3 hold; he attempted to taste the water on the end of the bilge sounding rod to determine whether it was fresh. He claims he tasted fresh water, and judged it safe to proceed with the voyage. Thus he claims that he first recognized a serious

problem when he arrived in Moji and found the ship down, inexplicitly, to summer marks.

Weyerhaeuser proved that the ship was inspected thoroughly by the Coast Guard in 1962, and less thoroughly annually. In 1962, the clapper valves were opened and visually inspected and found to be in good condition. Each year thereafter, and particularly in Portland just prior to the coastal voyage, the ship was routinely inspected for the purpose of being maintained in class. It was maintained in class, and indeed was eligible for more favorable insurance rates than other Liberty type vessels, because of its generally good condition. While the routine inspections did not include opening the clapper valves, they did include as a matter of course, hammer testing the valves for soundness. The written reports of these inspections indicate no problem with the valves. Weyerhaeuser did not, however, introduce testimony from anyone actually present at the inspections who could report that they were in fact properly conducted. One special inspection of #3 hold was made in Tampa, by a National Cargo Bureau surveyor, to certify that the hold was dry before fertilizer was loaded. Although concededly the hold was dark and the valve high above eye level, the inspector did not report any leaking on the skin of the ship, and did permit the fertilizer to be loaded.

The obligation to furnish a seaworthy vessel rests in the first instance with the owner of the vessel, Weyerhaeuser. Plaintiff contends that Weyerhaeuser had actual knowledge, prior to the Iligan voyage, that the ship was unseaworthy, and loaded the cargo and sent the ship to sea in wilful disregard of this condition. In plaintiff's view,

such gross negligence or wilful and wanton misconduct constitutes a deviation abrogating all limitations of liability either under Cogsa or in the contracts. Weyerhaeuser claims that it exercised due diligence to provide a seaworthy vessel and is therefore not liable for any damage to cargo resulting from the unseaworthy condition of the ship.

In the judgment of this Court, plaintiff has not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship. Nor has Weyerhaeuser proved the exercise of due diligence to provide a seaworthy vessel.

The ship was clearly unseaworthy in Cristobal, because of a corroded clapper valve which deteriorated over time. At Cristobal the clapper valve was below water and the ship was taking on significant quantities of water which were at the time confined to the #3 hold. But the master did not, in Cristobal, have knowledge of the actual defect in the ship. And at that time the valve was inacessible for his inspection. Although he had received earlier signals, none had clearly pointed to the clapper valve. His explanations of the high bilge readings were not wholly implausible, until the "taste test" in Cristobal.

On the other hand, the signals were sufficiently clear to put the owner on notice that there was some problem with water entry. The master had reported the problem in Portland, and after each voyage the marine superintendent read the logs. A sufficiently thorough inspection of possible sources of this water entry would, in all likelihood, have revealed the deteriorating valve. Weyerhaeuser's failure to locate the problem was want of due diligence to provide a seaworthy vessel. The burden is on the ship-

owner to prove the exercise of due diligence; Weyerhaeuser's evidence of routine inspections, in the context of an unusual problem, does not suffice to carry this burden.

After a complete review of the evidence, this Court finds that Weyerhaeuser failed to exercise due diligence to provide a seaworthy vessel, but did not have actual knowledge of the unseaworthy condition of the ship prior to the trans-Pacific voyage in question. Weyerhaeuser is therefore liable to plaintiff in the amount of $500 per package plus interest in accordance with the provisions of Cogsa and the applicable contracts, as discussed below.

Iligan against Weyerhaeuser

Iligan admits that as between itself and Weyerhaeuser, the contract of carriage was the bill of lading dated December 16, 1966. Thus, Cogsa applies of its own force, since the bill of lading is "evidence of a contract of carriage." 46 U.S.C. § 1300.

Under Cogsa, unless the contract otherwise provides, the carrier is liable for damage to cargo caused by the unseaworthiness of the vessel only in the event of want of due diligence to make the ship seaworthy, and in that event, only to the extent of $500 per package. 46 U.S.C. § 1304(1), (5). Iligan contends that if the conduct of the carrier in sending an unseaworthy vessel to sea exceeds "want of due diligence" and can be characterized as gross negligence or wilful and wanton misconduct, it will constitute an "unreasonable deviation" from the contract of carriage, and will entitle the cargo owner to the benefit of that line of cases which hold the carrier liable as an insurer for the full amount of damage. *See, e.g., The Willdomino*, 272 U.S. 718 (1927); *The Louise*, 53 F. Supp. 445

(D. Md. 1945); *Jones* v. *The Flying Clipper*, 118 F. Supp. 366, 367 (S.D.N.Y. 1953).

This is admittedly a novel theory, and this Court is not prepared on the facts before it so to extend the sweep of the concept of "deviation." Essentially Iligan attempts to combine reasoning from early cases dealing with breach of the implied warranty of seaworthiness, at one time rigorously imposed by the courts on every contract for the carriage of goods by sea, with the now equally rigorous concept of deviation from the contract of carriage which abrogates all clauses limiting the liability of the carrier. Such a blend does not comport with current admiralty law.

A. The Warranty of Seaworthiness

The courts at one time implied an absolute warranty of seaworthiness into every contract for the carriage of goods by sea. *See* Kanuth, Ocean Bills of Lading, 192, *et seq.* (1953); 1 Carver, Carriage by Sea § 102, *et seq.*, (12th ed. 1971); *The Caledonia*, 157 U.S. 124 (1895). Breach of this warranty was a failure of condition and, if material, permitted the shipper to refuse to load his cargo and thus to repudiate the contract. *See Aaby* v. *States Marine Corporation*, 181 F. 2d 383 (2d Cir. 1950), *cert. den.*, 340 U.S. 829 (1950). Breach also permitted the shipper to recover for resulting damage to cargo. *The Caledonia, supra; The Malcolm Baxter, Jr.*, 277 U.S. 323 (1928). But breach of this warranty did not serve wholly as an "ouster" of the contract; the carrier became liable only for that damage causally connected to the unseaworthiness. Gilmore and Black, The Law of Admiralty § 3-27, n. 34, at 129 (1957). For the protection of the shipper, the parties were permitted contractually to limit this obligation only with the clearest language; in the United States the courts refused to enforce even clear contract

terms relieving the carrier of the obligation to exercise due diligence. *See* Knauth, *supra*, at 192, Gilmore and Black, *supra*, at 120. A clause limiting the amount of liability for damage to cargo, in the absence of terms clearly reducing the obligation to provide a seaworthy vessel, left the ship liable for the full amount of damage caused by unseaworthiness. Carver, *supra* § 127.

The Harter Act of 1893, 46 U.S.C. §§ 190-195, codified this judicial policy, while at the same time permitting the carrier to "except", that is to eliminate liability entirely, damage caused by certain specified conditions or events, including certain deviations (see discussion, *infra*) provided that it had exercised due diligence to make the vessel seaworthy. Cogsa went further, and for certain bills of lading entirely abolished the absolute warranty of seaworthiness, replacing it with an obligation to exercise due diligence. 46 U.S.C. § 1304; *see* Knauth, *supra*, at 193. Cogsa also permitted the carrier to limit its liability for failure to exercise due diligence to not less than $500 per package, 46 U.S.C. § 1304(5), and completely relieved the carrier of liability for losses from certain specified causes, regardless of whether it had exercised due diligence. 46 U.S.C. § 1304(2). Thus, the once rigorous obligation imposed upon carriers has been significantly lessened, and the cases plaintiff cites must be read in the light of this statutory evolution.

B. Deviation

The concept of deviation from the voyage has also evolved. Originally, a deviation meant a geographic departure from the voyage planned, which was thought to displace any exceptions and limitations on liability con-

tained in the contract of carriage, on the theory that this was now a different voyage with different risks and the contract was inapplicable. See the discussion in Knauth, *supra*, at 240-270; Gilmore and Black, *supra*, § 3-40, *et seq.* At one time any departure from the contract or usual route was such a "deviation," see Knauth, *supra*, at 255, but the Harter Act introduced the concept of excusable deviations without such drastic effects. Generally, the carrier was held fully liable, as an insurer, contract clauses to the contrary notwithstanding, for damage incurred during a voluntary departure from the contracted or usual course, such as to pick up or discharge passengers or cargo. The carrier was not so liable, however, if the deviation were mandated by some exigency such as need for crucial repairs or the declaration of war. *See, e.g., Charbonnier* v. *United States*, 45 F. 2d 166, 172 (E.D. So. C. 1929), *aff'd*, 45 F. 2d 174 (4th Cir. 1930). Thus, displacement of the contract of carriage, as a consequence of deviation, must be distinguished from failure of condition as a consequence of unseaworthiness, discussed above The former renders the carrier liable as an insurer and imposes obligations beyond the terms of the contract; the latter entitles the shipper simply to repudiate the contract. *See*, Knauth, *supra*, at 253-254.

The concept of deviation has been extended to include non-geographic departures from the terms of the contract, which materially increase the risks to the cargo, and are said, by analogy, to make the voyage completely different from that contracted for. Such departures from the terms of the contract include stowage on deck rather than below deck, or proceeding in tow. *See, e.g., Jones* v. *The Flying Clipper, supra.* But see *DuPont de Nemours Int. S.A.* v. *S.S. Mormacvega*, No. 73-1376 (2d Cir Jan 7, 1974).

C. Deviation and Seaworthiness

A series of cases, all subsequent to the enactment of the Harter Act, and most, post-Cogsa, delineate the relationship of unseaworthiness and deviation. *The Willdomino, supra,* held that a geographic departure from the route planned, to correct an unseaworthy condition, when the emergency which necessitated the departure was caused by the inexcusable negligence of the owner, was not a justifiable deviation. As a result, the owner became liable as an insurer for the damage suffered by the cargo. The Court did not discuss whether the contract was displaced and prepaid freight refunded.

The Malcolm Baxter, Jr., supra, one year later, held that, even in the case of a geographic deviation to correct an unseaworthy condition resulting from the negligence of the carrier, the owner was liable only for the damage caused by the unseaworthiness, and not that caused by collateral consequences of the change in route. The contract was still in force, and prepaid freight accordingly retained by the carrier.

The Waalhaven, 36 F. 2d 706 (2d Cir. 1929), *cert. den.,* 281 U.S. 747 (1930), held that a geographic departure to correct an unseaworthy condition which the owner ought to have foreseen was not of itself a deviation displacing the contract of carriage. Where, however, the owner did actually know in advance of the unseaworthiness, and deliberately sent the ship to sea knowing that a change of route increasing the risk to the cargo was inevitable, the deviation was voluntary and the owner was liable as an insurer for resulting cargo damage.

By comparison, *The Louise, supra,* held the carrier liable as an insurer, and obligated to refund prepaid freight

despite contract terms to the contrary, where the geographic deviation to correct an unseaworthy condition was caused by "gross negligence" of the carrier. To support the finding of "gross negligence" the court pointed out that the carrier had specific knowledge of the unseaworthy condition of the ship, and knew that successful completion of the contracted voyage was impossible . *See also, Royal Ins. Co.* v. *United States*, 87 F. 2d 714 (2d Cir. 1937).

Thus, it appears that the discussions of negligence and gross negligence were important in these cases because geographic deviations to correct unseaworthy conditions which endangered the safety of the vessel were excusable, unless the shipper (sic: ship) were guilty of gross negligence. Only in the latter event was the shipper (sic: ship) liable for the entire cargo damage, despite contract clauses limiting its liability.

Iligan now argues for a rule that, if the carrier takes the cargo to sea in disregard of a known unseaworthy condition, even though it follows the contract route, it is liable as an insurer for all resulting losses, since its "gross negligence" has materially increased the risk of transport and thus displaced the contract of carriage. No case has yet so held. *See, United States* v. *Wessel, Duval & Co.*, 115 F. Supp. 678, 684-5 (S.D.N.Y. 1953) Indeed, Gilmore and Black favor restriction rather than expansion of the concept of non-geographic deviation, in view of the terms of insurance commonly available to cargo shippers today. *See* Gilmore and Black, *supra*, at 160-161; see also, Carver, *supra*, at § 750; Knauth, *supra*, at 249.

The logic of this view is supported by the statutory evolution in the liability of the carrier for the seaworthiness of the vessel, discussed above. The shipper knew there was no absolute warranty of seaworthiness. The

exercise of due diligence will always prevent the carrier from sending the ship to sea in a known unseaworthy condition. The shipper accepts the risk that the carrier will not have exercised due diligence to make the ship seaworthy, and can protect itself from the $500 package limitation on recovery for consequent cargo damage by the simple expedient of declaring a higher value on the cargo. The rule for which plaintiff so vigorously argues is not the sole protection available to cargo owners, as was once the implied absolute warranty of seaworthiness.

Even were the court prepared to accept plaintiff's legal theory, the record here does not warrant a conclusion that defendant Weyerhaeuser was guilty of wilful and wanton misconduct. Even in the context of a geographic deviation, the courts have made such a finding only where the master had specific knowledge of the ship's unseaworthy condition, indeed, of the specific defect, to the point of knowledge that successful completion of the voyage was impossible. *See The Louise, supra; The Waalhaven, supra.* The facts set forth above preclude such a finding in this case.

The evidence clearly indicates that the vessel was taking water at Cristobal and throughout the subsequent Pacific voyage, and was, therefore, unseaworthy. It also clearly shows that the shipowner failed to exercise due diligence to provide a seaworthy vessel by making sufficiently thorough inspections to discover and cure the source of prior abnormal bilge readings. But the evidence reflects that the clapper valve was above water, even as the bilges were pumped daily, on the earlier Pacific and coastal voyages, that the vessel was routinely inspected and maintained in class, that there had been no prior difficulties on this ship pertaining to the clapper valves, and that the

master did make several attempts, although retrospectively in the wrong direction, to locate the source of the high bilge readings. There was here no wilful and wanton misconduct.

Thus, the Court finds it unnecessary to consider plaintiff's claim that the statute is unconstitutional if interpreted to permit the wilful disregard of the unseaworthiness of the vessel.

D. Error of Management

Weyerhaeuser claims that the failure to repair the valve was an error of management for which, under 46 U.S.C. § 1304(2)(a), it is not liable, regardless of its lack of due diligence. But the vessel was unseaworthy at the beginning of the voyage, because of a condition not wholly within the power of the master to locate and correct, particularly after the cargo had been loaded in Tampa. The damage was not caused wholly by failure of the master to inspect the vessel while in port, but rather by failure of the shoreside owners of the vessel, who did have notice of the problem of excessive water entry to conduct an adequate inspection to locate and correct the defect. *See, The Walter Raleigh*, 1952 A.M.C. 618 (S.D.N.Y. 1951); *The Irisbank*, 115 F. Supp. 353 (S.D.N.Y. 1953); *See also*, The Isis, 290 U.S. 333 (1933) *McKinnon Co.* v. *Moore-McCormack Lines*, 1959 A.M.C. 1842 (S.D.N.Y. 1959); Knauth, *supra*, 196 *et seq.* This Court has found that the shipowner, not merely the master, failed to exercise due diligence to provide a seaworthy ship, and consequently must be liable.

E. The Limitation of Liability

The limitations of liability under Cogsa apply to the contract with the shipowner. Iligan points out that the

bill of lading is worded to read: ". . . liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, "as contrasted with Cogsa's wording, which exonerates the shipowner from liability "in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, . . ." 46 U.S.C. §1304(5). Plaintiff asserts that although the damaged goods were shipped in packages enumerated in the bill of lading, the amount of damages should be calculated by customary freight unit. It claims that a proper reading of the contract gives the cargo owner the option to choose the unit of measure of damages, and that Cogsa permits such a contract because it explicitly increases rather than decreases the shipowner's liability. 46 U.S.C. §1304(6). But the preceding phrase of the clause cited by plaintiff reads "or, in the case of goods not shipped in packages, per customary freight unit." Also, clause (1) of the bill of lading explicitly provides that nothing in the contract shall be interpreted to increase the liability of the Carrier. In view of this specific language, the Court finds liability in the amount of $500 per package.

F. Interest

The award of interest on the amount recovered is within the discretion of the admiralty court. *O'Donnell Transp. Co.* v. *City of New York*, 215 F. 2d 92, 95 (2d Cir. 1954). The allowance of interest is the general rule, and disallowance is supportable only in the face of exceptional circumstances. *The Wright*, 109 F. 2d 699, 702 (2d Cir. 1940). The underlying rationale is the desire to make whole the injured party. Defendants have enjoyed the use of the capital now to be paid to plaintiff, and cannot

now object to the award of interest on the ground that they were prepared to pay it earlier. Such a result would merely penalize plaintiff for its attempt to litigate when defendants were clearly at fault. Interest is awarded from the date of injury, March 26, 1967, the date the vessel arrived in Iligan City.

G. Prepaid Freight

Plaintiff has made a claim for the return of the prepaid freight. The cases hold that such prepaid freight is to be returned only if there has been a deviation from the voyage which goes to the essence of the contract. *The Louise, supra; The Waalhaven, supra.* Since the Court has determined that here there was no such deviation, the prepaid freight shall not be returned.

Iligan against New York Navigation

Plaintiff contends that even if the shipowner is statutorily protected by the provisions of Cogsa which limit its obligation to the exercise of due diligence to provide a seaworthy vessel, the charterer, New York Navigation, is not. Plaintiff argues that the operable contract between Iligan and New York Navigation is the Agreement of July 11, 1966 ("the Agreement") which contains an express warranty to furnish "seaworthy vessels" as well as an implied warranty to furnish a seaworthy vessel. The latter, as discussed below, is implied by law in every private contract of carriage and is not included in the Cogsa provisions which, with respect to contracts evidenced by bills of lading, reduce the implied warranty to furnish a seaworthy vessel to an obligation to exercise due diligence. The Agreement on its face contains no express provision limiting the liability of the charterer, either as to standard

of liability or as to amount. But Clause 11 of the Agreement incorporates by reference the terms of a standard form bill of lading, recited to be attached, which was, in fact, that actually used on this voyage. Clause 1 of the bill of lading in turn incorporates the provisions of Cogsa, and Clause 17 expressly limits liability for cargo damage to $500 per package.

Iligan contends that breach of the express warranty to furnish "seaworthy vessels" in itself operates to nullify the contract and therefore entitles it to recover full damages without the benefit of any package limitation incorporated by reference in Clause 11. In addition, it claims that breach of the implied warranty of seaworthiness operates as a failure of condition, with the same effect.

This Court agrees with plaintiff that the contract between Iligan and New York Navigation was the Agreement of July 11, 1966. However, it does not agree that this makes the charterer liable for the full amount of the damages suffered. Leaving aside for the moment the fact that Iligan did not treat the contract as nullified, but rather shipped the remaining installments of the steel mill on Weyerhaeuser ships under the terms of the Agreement, the law is clear that breach of an *express* warranty does not nullify the contract. The independent clauses limiting the amount of damages for breach of contract remain in effect. And inclusion of the Cogsa terms in the bill of lading, which was, in turn, incorporated into the Agreement, operates to reduce the *implied* warranty of seaworthiness, by contract, to an obligation to exercise due diligence.

Appendix A—Opinion of United States District Court dated March 14, 1974

A. The Agreement

Clause 11 of the Agreement stipulates that the bill of lading be stamped subject to the Agreement, the latter to control in case of inconsistency, although it appears that the actual bill of lading used on this voyage was not so stamped. New York Navigatioin argues that this failure to stamp the bill of lading made it the final contract among the parties, since Clause 26 of the bill of lading states that it supersedes all prior agreements. New York Navigation signed the bill of lading as agent for the master, not as carrier. Thus, it contends that it had no obligation whatever with respect to the seaworthiness of the vessel.

Normally, in the hands of a signatory to a prior contract, usually a charter party, a non-negotiated bill of lading operates as a receipt or as evidence of a contract rather than as the final contract. *See* Carver §§ 58 *et seq.*, esp. § 62, § 404; Gilmore and Black, *supra*, § 4-10; *Nichimen Company* v. *M.V. Farland*, 462 F. 2d 319 (2d Cir. 1972). The provision in the Agreement that the bill of lading be stamped subject to its terms was not expressed as a condition, breach of which would void either the clause or the contract, but as an additional requirement. There has been no showing that the omission of the stamp was anything but inadvertent. The Agreement continued in force after this voyage and governed five more shipments of cargo to the Philippines. There is thus no indication, either in the document itself or in the conduct of the parties, that the Agreement was not the contract between the parties. Accordingly, the terms of the Agreement determine the obligations of New York Navigation to Iligan.

B. The Express Warranty of Seaworthiness

Breach of an express warranty does not nullify the contract, but rather entitles the party not in breach to recover damages. *See*, Carver, *supra*, § 128;

> "Where, however the undertaking to provide a seaworthy ship is express, the express undertaking supersedes the implied undertaking, so far as it extends, and a limitation on claims will be effective to cut down that express undertaking."

See also, Carver, *supra*, §§ 356, 357; and the discussion in *Aaby*, *supra*. Thus, the clause limiting the amount of damages remains in effect when the express warranty is breached.

C. The Implied Warranty of Seaworthiness

The absolute warranty of seaworthiness at one time implied by the courts into every contract of carriage of goods by sea has been fully discussed above. Just as parties to a bill of lading were once entitled to reduce their obligation in this regard, within certain limits, so now are parties to other contracts of carriage by sea. They can do so by the simple expedient of incorporating the terms of Cogsa, which apply of their own force to bills of lading, into their contract. There can be no public policy objection to this. Gilmore and Black, *supra*, at p. 183.

As discussed above, Cogsa both reduces the implied warranty of seaworthiness to an obligation to exercise due diligence to provide a seaworthy vessel, and limits the amount of liability for breach of this warranty to $500 per package unless the parties agree that it shall be greater. Thus, by incorporating the provisions of Cogsa into the bill

of lading and thereby into the Agreement, the parties to the Agreement effectively reduced their implied warranty of seaworthiness to an obligation to exercise due diligence. *See Nichimen, supra; In Re Marine Sulphur Queen*, 460 F. 2d 89, 103 (2d Cir. 1972), *cert. den.*, 409 U.S. 982 (1973); *see also*, Gilmore and Black, *supra.* § 4-5, n. 41, at 182.

Even if breach of either warranty were potentially to nullify the contract, the fact remains that Iligan did not treat the contract as void, but continued to ship goods under its terms. In so doing, Iligan did not waive its right to collect damages for the losses incurred as a result of the breach, *see* Carver, §§ 103, 104. But the right to treat an entire contract as null for failure of condition which, assuming *arguendo* it existed, Iligan did not elect, is not the right to nullify selected terms of the contract. This, in effect, is what Iligan now attempts.

New York Navigation clearly breached its express warranty to furnish "seaworthy vessels". For this breach it is liable to Iligan in the amount of $500 per package. Equally clearly, New York Navigation did not breach its implied warranty to exercise due diligence to furnish a seaworthy vessel. There has been no showing that New York Navigation had any knowledge of a problem with the bilges, or was under any obligation to inspect the ship. To the contrary, the charterer was entitled to rely on Weyerhaeuser's warranty to it concerning the seaworthiness of the ship.

The damages here, for breach of the express warranty, are limited to the amount stipulated in the bill of lading and effectively incorporated in the Agreement.

Appendix A—Opinion of United States District Court dated March 14, 1974

New York Navigation against Weyerhaeuser

The time charter between Weyerhaeuser as shipowner and New York Navigation as charterer included both an express warranty by the owner to furnish a vessel, "tight, staunch, strong, and in every way fitted for service" and a general incorporation of the provisions of Cogsa, together with a clause providing that nothing in the charter was to be construed to increase the owner's liability over that provided in Cogsa. The parties are agreed that breach of the shipowner's warranty entitles the charterer to indemnificaiton for any resulting loss it suffers, including reasonable attorney's fees, under the applicable case law. *See Demsey & Associates* v. *S.S. Sea Star*, 461 F. 2d 1009 (2d Cir. 1972); *Nichimen, supra; United States* v. *S.S. Wabash*, 331 F. Supp. 145 (S.D.N.Y. 1971). It is also clear that the charterer is entitled to the award of fees incurred in defending against a charge of breach of such warranty, even if it is ultimately exonerated. *Guarracino* v. *Luckenbach Steamship Company*, 333 F. 2d 646, 648 (2d Cir. 1964). What the parties dispute here is the scope of the shipowner's warranty to the charterer, compared with that of the charterer to Iligan.

Weyerhaeuser claims first that its warranty was to exercise due diligence, because of the clause stating that nothing in the contract was to increase its liability over the standards of Cogsa. It then argues that if New York Navigation expressly or impliedly absolutely warranted the seaworthiness of the vessel to Iligan, the shipowner cannot be held for resulting losses.

The same principles of construction governing the Agreement also apply to the charter party. The express

absolute warranty of seaworthiness in the former supersedes the implied warranty of seaworthiness, so far as it extends, that is, until the time of delivery of the ship to the charterer. (Here, there was also a continuing obligation to maintain the ship in a seaworthy condition.) The warranty of seaworthiness at the time of sailing, implied by law in every contract of carriage, is reduced by the incorporation of the Cogsa provisions to an obligation to exercise due diligence. The clause stating that nothing is to be construed to increase the owner's liability beyond this therefore does not abrogate the specific, express language warranting the seaworthiness of the vessel at the time of delivery. Liability on these warranties is limited in amount to $500 per package. Thus, Weyerhaeuser's warranties to New York Navigation trace those of the latter to Iligan, except that the express warranty of seaworthiness in the charter party is more specific and comprehensive than that in the Agreement.

In view of these facts, Weyerhaeuser must indemnify the charterer for losses resulting from the unseaworthiness of the vessel, and from its lack of due diligence in providing a seaworthy vessel. These losses include reasonable attorney's fees. It makes no difference that plaintiff claimed the full amount of the lost cargo from New York Navigation on a theory of contract construction which would have expanded the scope of the warranty in the Agreement beyond that in the charter party. As between New York Navigation and Weyerhaeuser, the language of the charter party employed the same warranties as the Agreement, and was meant specifically to protect the charterer from losses resulting from the unseaworthiness

of the vessel. In this situation, where the shipowner defaulted in its obligation even to exercise due diligence, the charterer should recover.

In the event that Weyerhaeuser and New York Navigation are unable to agree on the amount of the attorney's fees, the Court will set the matter down for a hearing.

The foregoing constitutes the findings of fact and conclusions of law of the Court for the purposes of Rule 52, Fed. R. Civ. P.

Settle judgment on notice.

Dated: March 14, 1974

/s/ ROBERT J. WARD
U.S.D.J.

APPENDIX B

AMENDED JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Civ. 1137

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs,

—against—

S.S. JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants

This action having come on for trial before the Court (Honorable Edward C. McLean) without a jury in July 1972, and the Judge presiding at the trial having died before rendering an opinion, and the matter having been referred to the Honorable Robert J. Ward, and the parties having stipulated to a decision upon the record of the trial already had, which was supplemented by oral argument before Judge Ward on 7 February 1974, the issues having been duly tried and an opinion having been rendered under date of March 14, 1974, it is

Appendix B—Amended Judgment dated April 13, 1974

ORDERED, ADJUDGED and DECREED that the plaintiffs, Iligan Integrated Steel Mills, Inc., Continental Insurance Company, Standard Marine Insurance Company, Ltd., Royal Insurance Company, Ltd., Firemen's Fund Insurance Company, Commercial Union Insurance Company of New York, Employers Commercial Union Insurance Company and Aetna Insurance Company (at the trial the plaintifl Iligan International Corp. having been dropped as a plaintifl and the seven named insurance companies added as real parties in interest) recover of defendant Weyerhaeuser Company damages sustained by the plaintiffs, limited to the amount of $500.00 per package, with interest at the rate of 6% per annum from 26 March 1967 until the date of the final judgment herein, and their costs, and it is further

ORDERED, ADJUDGED and DECREED that the plaintiffs, Iligan Integrated Steel Mills, Inc., Continental Insurance Company, Standard Marine Insurance Company, Ltd., Royal Insurance Company, Ltd., Firemen's Fund Insurance Company, Commercial Union Insurance Company of New York, Employers Commercial Union Insurance Company and Aetna Insurance Company (at the trial the plaintiff Iligan International Corp. having been dropped as a plaintiff and the seven named insurance companies added as real parties in interest) recover of defendant New York Navigation Company, Inc. damages sustained by the plaintiffs, limited to the amount of $500.00 per package, with interest at the rate of 6% per annum from 26 March 1967 until the date of the final judgment herein, and their costs, and it is further

Appendix B—Amended Judgment dated April 13, 1974

ORDERED, ADJUDGED and DECREED that defendant New York Navigation Company, Inc. recover of defendant Weyerhaeuser Company whatever monies it pays to plaintiffs under this judgment and its costs, including reasonable attorney's fees, incurred in defending this action brought against it by plaintiffs but not its legal fees and disbursements incurred in pursuing its cross-claim against Weyerhaeuser Company and it is further

ORDERED that in the event that the parties are unable to agree on the amounts involved in this judgment, the Court will set the matter down for a hearing thereon and it is further

ORDERED that satisfaction of this judgment against either one of said defendants shall satisfy this judgment insofar as it concerns plaintiffs.

Dated: New York, New York
April 13, 1974

ROBERT J. WARD
U.S.D.J.

Judgment entered 4/13/74

RAYMOND F. BURGHARDT
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 196, 492, 493—September Term, 1974

(Argued November 13, 1974 Decided December 3, 1974.)

Docket Nos. 74-1553
74-1574
74-1677

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

—against—

S.S. JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

Before:

FRIENDLY, FEINBERG & GURFEIN,
Circuit Judges.

Appeals from a judgment of the District Court for the Southern District of New York, Robert J. Ward, Judge, 372 F. Supp. 859 (1974), in an action by cargo against a

ship, its owners and the time charterer. Cargo appeals from so much of the judgment as allowed defendants to limit their liability to $500 per package under the Carriage of Goods by Sea Act. The ship and the owner appeal from so much of the judgment as accorded the time charterer indemnity for all expenses incurred in resisting cargo's claim.

Affirmed.

DAVID MALOOF, ESQ., NEW YORK, N.Y. (Donovan, Donovan, Maloof & Walsh, Esqs., New York, N.Y., of Counsel), for Plaintiffs-Appellants.

WILLIAM WARNER, ESQ., NEW YORK, N.Y. (Symmers, Fish & Warner, Esqs., New York, N.Y., of Counsel), for Defendant-Appellee-Appellant, Weyerhaeuser Company.

M. E. DEORCHIS, ESQ., NEW YORK, N.Y. (LeRoy S. Corsa, Esq., Brian D. Starer, Esq., and Haight, Gardner, Poor & Havens, Esq., of Counsel), for Defendant-Appellee-Appellant New York Navigation Company, Inc.

FRIENDLY, Circuit Judge:

In this action for cargo damage in the District Court for the Southern District of New York, cargo appeals from that part of the judgment which limited its claim against the ship, its owner, and the time charterer to $500 per package pursuant to § 4(5) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5), apparently only some $94,-

000, as against approximately $2,200,000 which represents the full amount of damage to cargo. The ship and its owner appeal from so much of the judgment as awarded the time charterer indemnity for all of its attorneys' fees incurred in resisting cargo's claims. The action ,tried before the late Judge McLean, was disposed of in a thorough opinion by Judge Ward, 372 F. Supp. 859 (S.D.N.Y. 1974), whose statement of the facts we incorporate by reference. Since we are substantially in agreement with Judge Ward's opinion, we shall limit ourselves to a few observations.

It is not disputed that the cause of the virtual destruction of plaintiff's shipment of 188 packages of valuable parts for a steel mill was "a massive entry of seawater into the ship's #3 hold, which slowly permeated the fertilizer [stowed in that hold], formed a slurry, and finally burst through the [temporary] non-watertight bulkhead into the #2 hold, inundating and destroying the Iligan cargo." 372 F. Supp. at 863. The entry of seawater was due to a defect which had developed in "a pipe called a sanitary or soil line which drains from the crew's toilet, exists the ship through an opening in the hull, and permits waste to be discharged outside the ship", id. at 862. Resting on lugs over the opening of the pipe was a cover plate, called a clapper valve, which was below the level of the sea when the vessel was fully loaded; the plate was designed to swing open to allow the discharge of waste but then to close and, resisting the pressure of the ocean, prevent the entry of seawater. A damage survey after the vessel's arrival in the Far East showed that the lugs were "completely corroded with rust, so that the valve was frozen in an open position, and the sanitary line pipe was cor-

roded through, with a hole approximately 2" by ¼", 372 F. Supp. at 863, through which water entered the #3 hold. The district judge found that the ship and its owner had not sustained their burden of proving the exercise of due diligence to make the ship seaworthy under § 4(1) of COGSA, 46 U.S.C. § 1304(1), and that New York Navigation Company, the time charterer, had breached a contractual warranty to furnish a seaworthy ship—rulings from which these parties have not appealed. However, he limited the liability of the defendants to $500 per package under § 4(5).

Plaintiff's principal contention in the trial court and on appeal, for the award of full damages against the ship and its owner, is based on what the judge called "a novel theory", 372 F. Supp. at 865. It is premised on a factual claim that the owner was on notice of the defect before the voyage began. Building on this, plaintiff contends that the owner's conduct constituted such gross negligence or wilful and wanton misconduct as to constitute an "unreasonable deviation" from the contract of carriage, and that a deviation should "oust" the contract and deprive the carrier of the protection afforded by § 4(5). Since Judge Ward found that "plaintiff has not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship" prior to the trans-Pacific voyage, 372 F. Supp. at 865, he did not decide what result a contrary conclusion would have demanded. Although we do not consider the judge's conclusions to be in error, even under this circuit's standard for review, Mamiye Bros. v. Barber SS Lines, Inc., 360 F. 2d 774 776-78 (2d Cir.), cert. denied, 385 U.S. 835 (1966); Esso Standard Oil Co. v. S.S. Gasbras Sul, 387 F. 2d 573 (2 Cir. 1967), cert. denied, 391 U.S. 914 (1968); Cleary v. United States Lines Co., 411 F. 2d 1009,

1010 (2 Cir. 1969), the question is likely to arise again. Since it has been thoroughly argued, we think it desirable, as an alternative ground of decision, to reject the legal theory advanced by the plaintiff.

Plaintiff's argument, rearranged and supplemented to give it greater forcefulness is essential as follows: The cornerstone of the argument is The Willdomino, 272 U.S. 718, 725 (1927), a pre-COGSA case in which a ship left port with a grossly inadequate supply of coal, known to be so by the carrier, which necessitated a departure from her course. During the deviation the ship struck a reef or a submerged object which caused water to enter and damage the cargo. The Supreme Court held, speaking through Mr. Justice McReynolds, that when a loss occurred during an unreasonable deviation from the agreed course of the voyage, the ship "became liable as an insurer for any damage suffered by the cargo" and could not avail itself of the Harter Act, 27 Stat. 445 (1893), exception "for damage or loss resulting from faults or errors in navigation or in the management" of the vessel. A prior English case, Joseph Thorley, Ltd. v. Ortus S.S. Co., Ltd., [1907] 1 K.B. 660, 668 (C.A.), had similarly held that an unreasonable deviation from the intended path of the voyage deprived the ship of the benefit of exceptions in the bill of lading Subsequently, after adoption of the English Carriage of Goods by Sea Act, 1924, which like COGSA was derived from the Hague Rules and the Brussels Convention, the House of Lords held in Stag Line, Ltd. v. Foscolo Mango & Co., Ltd., [1932] A.C. 328 (1931), that the Thorley principle continued to prevail despite the fact that Art. IV-5 of the English statute, the equivalent of § 4(5) of COGSA, on its face contained no exception for losses due to unreasonable deviation. Lord Atkin there stated:

> I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act; and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of "the contract of carriage of goods by sea" to which the Act applies.

Id. at 340. Reaching the same conclusion, Lord Russell of Killowen said:

> It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage. If it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms.

Id. at 347.

Plaintiff's next building stone is St. Johns N. F. Shipping Corp v. S.A. Companhia Geral Commercial, 263 U.S. 119 (1923), which, like The Willdomino, preceded COGSA. Unlike the cases of geographical deviation discussed up to this point, here the vessel had breached its agreement to stow a cargo of barrels containing rosin under deck and they had to be jettisoned during a storm. The Court, again speaking through Mr. Justice McReynolds, said:

> By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had

> been agreed, and thereby caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination.

Id. at 124-25 (footnotes omitted).[1]

The next element vital to the construction of plaintiff's argument is Jones v. The Flying Clipper, 116 F. Supp. 386 (S.D.N.Y. 1953), where Judge Weinfeld, drawing these lines of authority together, ruled that when the ship had breached its carriage agreement by transporting cargo on deck, which the St. Johns case forced the carrier to concede to be "a 'deviation' in law", 116 F. Supp. at 387, the ship could not avail itself of § 4(5) of COGSA. The final block supporting plaintiff's argument, which it has not cited to us, was this court's approval of The Flying Clipper in Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Pro-

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1. Although Mr. Justice McReynolds cited no authority for holding unauthorized deck storage to be a "deviation", this court had so held in The Sarnia, 278 F. 459 (2 Cir. 1921), cert. denied, 258 U.S. 625 (1922), mentioned in another portion of Mr. Justice McReynolds' opinion. This was over a dissent by Judge Mack to the effect that, however the carrier's actions were characterized, the contractual limitation of liability should not be displaced. See also Niles-Bement-Pond Co. v. Dampkiesaktiesel-Kabet Balto, 282 F. 235 (2 Cir. 1922), where Judge Hough, a great admiralty judge, expressed the same view as Judge Mack's in a case of overcarriage but felt compiled by The Sarnia to concur in a displacement of the damage limitation.

ducer, 422 F. 2d 7, 18 (2 Cir. 1969), cert. denied, 397 U.S. 964 (1970).[2]

Relying on this structure, plaintiff urges that we should expand the concept of "quasi deviation", see 2 Carver, Carriage by Sea, §§ 750, 750A, 750B (12th ed. 1971), which entitled the shipper to treat the carriage contract as abrogated, thereby eliminating the damage limitation contained in § 4(5) of COGSA,[3] to include gross negligence or wanton and wilful misconduct in tendering an unseaworthy ship.

We think the principle of "quasi-deviation" is not one to be extended. As previously noted, even the holding that a deviation in the geographical sense voids limitations on the carrier's liability seems inconsistent with the language of COGSA. It has been justified in part by what is—or at least was—the especially serious effect of such a deviation on the shipper. As Lord Atkin explained in Hain S.S. Co. v. Tate & Lyle, 41 Com. Cas. 359, 55 Ll. L.R. 159, 173 (1936), quoted in 1 Carver, supra:

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2. Relying on the language and structure of the statute, at least one court of appeals had rejected the reasoning of The Flying Clipper, holding that despite an unreasonable geographic deviation by the carrier its liability was limited to $500 pursuant to § 4(5). See Atlantic Mutual Ins. Co. v. Poseidon Schiffahrt, 313 F. 2d 372, 374-75 (7 Cir.), cert. denied, 375 U.S. 819 (1963) (overcarriage of goods by shipper coupled with delay of one and one-half years in delivery). See also Nassau Glass Co. v. Noel Roberts, Ltd., 249 F. Supp. 116 (S. D. Fla. 1965) (on deck storage of plate glass). But see Seaboard Shipping Co. v. E. I. Dupont de Nemours & Co., 361 F. 2d 833, 835-36 (5 Cir.), cert. denied, 385 U.S. 973 (1966) (Shipper liable in full as an insurer of the cargo where damage resulted from on-deck deviation).

3. Although § 4(5) reads as if it had independent force, COGSA "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading", Gilmore & Black, Admiralty § 3.25 at 124 (1957).

> No doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo-owner when the ship has deviated has become uninsured.

See to the same effect Gilmore & Black, Admiralty § 3-40 at 156 (1957), also questioning whether the premise with respect to marine insurance is true today, and The Citta di Messina, 169 F. 472, 474-75 (S.D.N.Y. 1909) ("'deviation' is a term of art, belonging in the main to the law of marine insurance", Hough, J.). Up to this point the concept of "quasi deviation" in the United States has recognized only one instance, deck stowage of cargo which the carrier had agreed to carry below deck, for which the carrier becomes liable in full as an insurer of the shipper's cargo. Whatever may be thought of that principle, it is easy to administer and carriers know the risks.

In contrast, acceptance of plaintiff's argument would mean that in almost all cases of loss due to unseaworthiness, in addition to the inquiry, directed by § 4(1) of COGSA, whether the carrier had used due diligence to make the ship seaworthy, with the burden cast on the carrier or other person claiming exemption under that section,[4] shippers or, realistically, their insurers would demand a further inquiry into the degree of the carrier's culpability, with enormous potential liability, as illustrated by this case, riding on the decision of the fact finder, protected in many circuits by the "unless clearly erroneous" rule, see, e.g., Merritt v. Interstate Transit Lines, 171 F. 2d 605,

4. With the limitations in § 4(5) available and generally prevailing doubtless many such cases are settled by payment of part or all of the amount there provided, without action having been brought or at least without a trial.

608-09 (8th Cir. 1948); Imperial Oil Co. v. Drlik, 234 F. 2d 4, 10 (6 Cir.), cert. denied 352 U.S. 941 (1956); Pacific Tow Boat Co. v. States Marine Corp., 276 F. 2d 745, 752 (9 Cir. 1960), and enjoying great weight even in this one. This is a quite different matter from introducing the concept of gross negligence on the limited issue of whether a geographical deviation was unjustifiable. See The Willdomino, supra, 272 U.S. at 725-28; The Wallhaven, 36 F. 2d 706, 709 (2 Cir. 1929), cert. denied, 281 U.S. 747 (1931). The difficulties that have been experienced in defining and applying varying degrees of negligence or even the concept of "wilful and wanton" are indicated in Prosser, Torts § 34 (4th ed. 1971). In the case of international air transportation, when it was desired that a limitation on liability should be lost by wilful misconduct, clear language appropriate to that end was used. Warsaw Convention, Art. 25, 49 Stat. 2 at 3000, 3020. If cases relating to pre-COGSA facts are relevant, as they unquestionably are, see Gilmore & Black, supra, § 3.25 at 127, Royal Insurance Co., Ltd. v. United States, 37 F. 2d 714, 716 (2 Cir. 1937), is very much in point. Distinguishing cases such as The Willdomino where the known unseaworthiness made completion of the agreed voyage impossible without geographical deviation, we there held that the fact that the owner's officers "determined to take a chance and needlessly risked new perils in the voyage" did not justify applying the doctrine of deviation so as to disregard provisions of the bill of lading with respect to giving notice of damage. In sum, loss due to an allegedly exceptional degree of negligence in furnishing an unseaworthy ship falls into Lord Diplock's category of risks concerning which "it is more practical and economical from

the point of view of insurance to spread the risk to the cargo in excess of a fixed limit among a number of cargo insurers rather than to concentrate it in the carrier's [protection and indemnity] insurer." Diplock, Conventions and Morals—Limitation Clauses in International Maritime Conventions, 1 J. Mar. L. & Comm. 525, 528-29 (1970).

We agree with and have nothing significant to add to Judge Ward's disposition of Iligan's other arguments against the ship and its owner, and also against the time charterer, New York Navigation Co., Inc., which had agreed to provide seaworthy ships for the transportation of Iligan's machinery.[5]

We likewise adopt the portion of Judge Ward's opinion, 372 F. Supp. at 872, allowing New York Navigation to recover from the ship and its owner all the attorneys' fees which it incurred in resisting Iligan's claims. Although some of these concerned the effect of New York's warranty

5. Iligan advances one argument against New York Navigation's entitlement to the per package limitation which is not discussed in Judge Ward's opinion. This is that the contract between Iligan and New York Navigation states that it is to be governed by New York law and § 7-309(2) of the Uniform Commercial Code as adopted in New York allows a carrier to limit liability to a value stated in a bill of lading only when the carrier's rates are dependent on value. Assuming that the argument was advanced below and thus is properly before us, it is without merit in light of UCC § 7-103, which reads:

Relation of Article to Treaty, Statute, Tariff, Classification or Regulation.

To the extent that any treaty or statute of the United States, regulatory statute of this State, or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this Article are subject thereto.

of seaworthiness as against the lesser liability imposed by § 4(1) of COGSA and the necessity of having to field Iligan's attempts to show that New York had not effectively incorporated the COGSA limitation, these were foreseeable consequences of the breach of the warranty of seaworthiness in the time charter. New York may also recover attorneys' fees for resisting Iligan's claims in this court. If the parties are unable to reach an agreement concerning the appropriate amount of those charges, they shall be fixed by the district court.

The judgment is affirmed and the cause remanded to the district court for the addition of a provision in the judgment conforming to the last two sentences of the preceding paragraph. The ship and its owner may recover their costs on appeal against Iligan. New York Navigation may recover three-quarters of its costs against Iligan and one-quarter against the ship and its owner.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 74-1553

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of December, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,
HON. MURRAY I. GURFEIN,
Circuit Judges.

ILIGAN INTEGRATED STEEL MILLS, INC., *et al.*,

Plaintiffs-Appellants,

v.

SS JOHN WEYERHAEUSER, etc., *et al.*,

Defendants-Appellees-Appellants.

Plaintiffs-Appellants having petitioned for rehearing by the panel and having made a suggestion of rehearing en banc, it is ordered by the panel:

Appendix D—Petition for Rehearing by the Panel

(1) that the opinion should be modified as follows:

Page 534, second line from bottom, change "apparently" to "perhaps".

Page 535, first full paragraph, first sentence, change "188 packages of valuable parts for a steel mill" to "188 pieces of valuable machinery and parts for a steel mill".

(2) that the petition for rehearing by the panel is otherwise denied.

/s/ HENRY J. FRIENDLY

/s/ WILFRED FEINBERG

/s/ MURRAY I. GURFEIN

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

74-1553

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of January, one thousand nine hundred and seventy-five.

ILIGAN INTEGRATED STEEL MILLS, INC., *et al.*,

Plaintiffs-Appellants,

—against—

SS JOHN WEYERHAEUSER, etc., *et al.*,

Defendants-Appellees-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Irving R. Kaufman

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of December, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY
HON. WILFRED FEINBERG
HON. MURRAY I. GURFEIN

Circuit Judges.

U.S. DISTRICT COURT
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Appendix F—Judgment of Affirmance dated December 3, 1974

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

DOCKETED AS A JUDGMENT #75,108 ON FEB 3, 1975

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed and that the actions be and they hereby are remanded to said District Court for further proceedings with costs to be taxed against appellants in favor of defendants-appellees-appellants SS John Weyerhaeuser etc. and Weyerhaeuser Company and that appellee-appellant New York Navigation may recover three-

quarters of its costs against plaintiffs-appellants and one-quarter of its costs against appellee-appellant SS John Weyerhaeuser etc. and Weyerhaeuser Company in accordance with the opinion of this Court.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

A true copy,

/s/ A. DANIEL FUSARO
Clerk.

APPENDIX G

AMENDMENT V-CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived a life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Sec. 1254(1)

COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1333

ADMIRALTY, MARITIME AND PRIZE CASES

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. Sec. 1301(a), (b)

DEFINITIONS

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

46 U.S.C. Sec. 1302

DUTIES AND RIGHTS OF CARRIER

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

46 U.S.C. Sec. 1303(8)

LIMITATION OF LIABILITY FOR NEGLIGENCE

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability

for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

46 U.S.C. 1304(1), (5)

RIGHTS AND IMMUNITIES OF CARRIER AND SHIP— UNSEAWORTHINESS

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

AMOUNT OF LIABILITY; VALUATION OF CARGO

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per

customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

NEW YORK UNIFORM COMMERCIAL CODE Sec. 7-309

DUTY OF CARE; CONTRACTUAL LIMITATION OF CARRIER'S LIABILITY

(1) A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff. L. 1962, c. 553, eff. Sept. 27, 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT WEYERHAEUSER COMPANY IN OPPOSITION.

FREDERICK FISH,
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345 Park Avenue,
New York, New York 10022.
(212) 751-6400.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74---1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT WEYERHAEUSER COMPANY IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (App. A of Petition) is reported at 372 F. Supp. 859. The opinion of the United States Court of Appeals for the Second Circuit (App. C of Petition) is reported at 507 F. 2d 68.

QUESTION PRESENTED.

Whether a shipowner, who is liable to cargo interests for failure to exercise due diligence to make its vessel seaworthy before and at the beginning of a voyage, is entitled to the benefit of the $500 per package limitation provided by the United States Carriage of Goods by Sea Act, U. S. Code, Title 46, Section 1304(5).

STATEMENT.

This action was brought by Iligan Steel Mills, Inc. *et al.* (cargo interests) against Weyerhaeuser Company, owner of the SS JOHN WEYERHAEUSER, and against New York Navigation Company, Inc., charterer of said vessel, to recover $3,000,000 for wetting, rusting, contamination, breakage and shortage of packages and pieces of steel manufacturing and electrical supplies and equipment shipped by Iligan from Baltimore, Maryland in December 1966 and consigned to Iligan at Iligan City, Republic of Philippines. The Iligan cargo was stowed in Nos. 2 and 4 holds of the vessel and on deck. Other cargo for other parties, fertilizer in bulk, destined for Korea, was stowed in holds Nos. 1, 3 and 5. The fertilizer cargo was loaded and stowed at Tampa, Florida subsequent to the loading of the Iligan cargo at Baltimore. All cargo was in apparent good order and condition when loaded and upon arrival at Iligan City a portion of Iligan's cargo was damaged. The damage resulted from leakage en-route through a hole which had developed in a sanitary line overboard discharge valve located in No. 3 hold. Cargo contended that the shipowner and the charterer failed to exercise due diligence to furnish a seaworthy ship, that they did not properly and carefully carry, keep and care for the cargo, that they

accepted the shipment at a time when they had knowledge that the vessel was grossly unseaworthy and that they knew that the vessel, while undergoing engine repairs at Panama Canal Zone en-route was taking an unusual quantity of water into a cargo hold. Cargo further contended that the conduct of shipowner and charterer was such that they were not entitled to avail themselves of the $500 per package limitation of liability provision of the United States Carriage of Goods by Sea Act (hereinafter COGSA), 46 U. S. C. § 1304(5). The shipowner contended that due diligence had been exercised to make the ship seaworthy; alternatively that the shipowner was entitled to the benefit of the $500 per package limitation of COGSA, 46 U. S. C. § 1304(5).

The District Court found: (1) Weyerhaeuser (shipowner) had failed to exercise due diligence to provide a seaworthy vessel and accordingly was liable to plaintiffs, (2) there was no wilful misconduct or wanton misconduct on the part of Weyerhaeuser, (3) the terms of the United States Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et. seq.* (COGSA) were applicable and Weyerhaeuser's liability limited to $500 per package of cargo, (4) New York Navigation (charterer) was liable to Iligan (cargo) for breach of warranty of seaworthiness, (5) New York Navigation's liability was also limited to $500 per package, and (6) that New York Navigation was entitled to indemnity from Weyerhaeuser, including its attorneys fee and expenses incurred in defending the action against it by cargo.

The Court of Appeals was substantially in agreement with the opinion of the District Court and concurred in the statement of the facts by the District Court which it incorporated by reference. The findings of the District Court that "plaintiff has not proved that Weyerhaeuser knew or

must have known of the unseaworthy condition of the ship" prior to the Transpacific voyage and that "There was here no wilful and wanton misconduct" were dispositive of the case against Weyerhaeuser. The Court of Appeals also adopted the disposition of the District Court of plaintiffs' arguments against the time charterer, New York Navigation Co., Inc. The judgment of the District Court was affirmed.

ARGUMENT.

There is before the Court no issue as to Weyerhaeuser's (shipowner) liability for lack of due diligence to provide a seaworthy vessel or as to Shipowner's liability to indemnify New York Navigation (charterer) for Charterer's limited liability to Cargo. Petitioners (cargo interests) do not dispute that a Shipowner, liable by reason of lack of due diligence, is nevertheless entitled to limitation of liability to $500 per package under § 1304(5) of the United States Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et seq.* Their contentions are that the bill of lading (contract of carriage) is void and the statute inapplicable. All their contentions, including their contentions as to misrepresentation, fraud and the unconstitutionality of this statute are based on the premise that Shipowner was guilty of deliberate, intentional, wilful and wanton misconduct (the addition of "gross negligence" in the alternative constitutes no additional grounds, for all relevant decisions, in referring to gross negligence, have equated it with wilful and intentional wrongdoing). Both of the Courts below have found as facts that Weyerhaeuser neither knew or must have known of the unseaworthy condition of the ship and that there was no wilful and wanton misconduct, *cf. Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336

U. S. 271 (1949). The thrust of Petitioners' submission is that these co..current findings of fact were clearly erroneous.

POINT I.

THE DECISIONS BELOW WERE CLEARLY CORRECT.

The JOHN WEYERHAEUSER was a vessel employed in the carriage of merchandise for hire by water and was owned and operated by Weyerhaeuser on the voyage involved. New York Navigation Company, Inc. was engaged in business as an ocean carrier of merchandise by water for hire and chartered the JOHN WEYERHAEUSER. The JOHN WEYERHAEUSER, a Liberty type steamship, built in 1944, was modified in 1961. In the modification program of 1961 part of the cargo holds were altered, certain bulkheads were removed and hatch coverings were refitted; the crew quarters were stripped down, scrapped and rebuilt. The cost of this modification was a little more than half a million dollars.

The JOHN WEYERHAEUSER was subject to annual inspections by the United States Coast Guard and by the American Bureau of Shipping (hereinafter referred to as A. B. S.) as well as to periodic special surveys and to special surveys in the event of a casualty or when material repairs were made. In March, 1966 the vessel underwent a "Special Condition Survey for use by the shipowner's brokers in connection with their dealings with cargo underwriters" in which the main deck, all cargo holds, shell plating above water, the areas particularly subjected to corrosion, and tank top plating in all cargo hatches, were closely examined and found in good condition; plating of numbers 1 and 3 holds gauged, bilge system tested. operational test made of engine, boilers and

machinery and steering gear which were found satisfactory, etc. The surveyor reported:

> The condition of this vessel hull, holds, spaces, machinery, pumping apparatus, boilers and equipment indicates satisfactory maintenance and the condition of this vessel is well above the average cargo vessel of this age group.

The ship was maintained in first class operating condition.

In the conversion of 1961, lower holds numbers 2 and 3 were transformed into a common hold with a cubic capacity in excess of any other hold in the vessel. With the usual drag (draft of the vessel greater aft than forward) drainage was into two bilge wells or "rose boxes" located at the after end of the common hold, one on each side of the vessel. These bilge wells were boxes 7 feet in width across the ship, 18 inches deep and 18 inches long. The top of the bilge well was flush with the cargo bearing surface or ceiling at the bottom of the hold. Each bilge well had a capacity of 65 to 75 gallons and could be pumped in a reasonable short time. Two sanitary drainage or soil lines entered No. 3 hold from overhead close to the after bulkhead with the lines close to the skin of the ship on either side of the vessel. Each line led to a sanitary or storm valve several feet below the overhead. After passing through the valve the line turned at a right angle and passed through the skin of the ship to form an overboard discharge. The soil line discharge valves were located about two feet beneath the 'tween deck and about 20 feet above the bottom of number 3 lower hold so that the overboard outlet was not submerged until the mean draft of the vessel reached about 25 feet 6 inches. The storm valve contained a clapper within its body. This clapper was not intended to be water-tight and to prevent access

of water from outside into the soil line itself. It was designed to prevent the force of the seas outside causing a back up in the soil line into the toilets overhead. Irrespective of the clapper, no water could enter cargo spaces as long as the pipes and shells of the valves were intact.

Prior to the voyage in question the JOHN WEYERHAEUSER made a voyage from Norfolk, Virginia to Madras, India where her cargo of ammonium sulphate was discharged during the period 11 August to 7 September 1966. On 7 September the vessel sailed for West Coast ports of the United States in ballast via Singapore for bunkers. At no time during the voyage to India and return to Portland, Oregon did the bilges overflow. At no time was there any entry of water into number 2-3 cargo hold. This common hold was carefully examined upon completion of discharge and there was no evidence of the entry of any water. On return of the vessel to Portland there was no indication of any leakage whatsoever into number 2-3 hold. There was no water damage to the cargo of ammonium sulphate carried to and delivered at Madras. The captain believed that a pumping problem which occurred at Madras was due to a back-up from the bilge suction line. On August 16, September 1, 2, 9, 16 and 20, 1966 there were continuing attention and repairs to bilge pumps, valve chests, valve springs, suction valves and cargo hold bilge strainers. There were no significant bilge soundings or pumping en route from Singapore to Portland. On arrival at Portland in addition to generator and voyage repairs the ship also underwent a Biennial United States Coast Guard inspection and an A. B. S. 2nd Special Periodic Survey No. 2 and Load Line Survey. Marine Superintendent Baumgartner attended with the surveyors, although not constantly at their side. He entered number 2-3 hold and made an examination as to whether the vessel had sustained any damage from cargo operations that had not been

reported. He testified that if a sanitary line had been leaking there would be a foul odor and if there had been any leak through a body valve or a gasket there would be signs of salt rust and corrosion running down the side of the ship. He saw no evidence of any such leakage. As shown by all the surveys, there was no evidence of any leakage into No. 3 cargo space. There had been and was no report from any vessel personnel that there was any problem in that area. The discharge valves were in fact opened, examined and found in good order in both 1962 and 1965. The sanitary discharge valves were not opened in 1966, but were included in the general visual inspections. It was found after the casualty that the discharge valve that failed had become wasted on the inside, but that except for the particular area where wastage occurred, the metal in the valve was sound and externally presented a good appearance. Both Operations Manager Mandle and Marine Superintendent Baumgartner were positive that at no time prior to the arrival of the vessel at Moji enroute to Iligan City had they received any oral or written reports about any leakage or back up of water into No. 3 bilges.

After completing repairs, inspections and surveys at Portland the vessel loaded a full cargo of wet, green lumber and sailed from Coos Bay on 31 October for Boston and Portsmouth, Rhode Island. On several days during this voyage there were log entries of 20 or 24 inches in one or the other of the No. 3 bilges. On this inter-coastal voyage the soil line discharges were either on the water line or 6 inches above. On an inter-coastal voyage, such as this, with transit from cool climate to tropics and return to cold climate it was normal for there to be substantial sweating and drainage from the wet lumber. Numbers 2 and 3 were a common hold with bilge wells at the after end of number 3 and the common hold was far greater in size than numbers 1, 4 and 5 so that more accumulation was to be

anticipated in the number 3 bilges. There was substantial accumulation in the other holds as well, with soundings up to 13 inches in number 1, 17 inches in number 4 and 18 inches in number 5. The inter-coastal soundings are properly attributable to sweat and drainage. After completing discharge of the lumber cargo the vessel proceeded to Baltimore where on 12 December 1966 she was delivered by the shipowner to New York Navigation Company under time charter for a voyage from the East coast of the United States to the Far East. At the time of delivery an on-hire survey was conducted and further survey was made by representatives of the National Cargo Bureau. An inspection of the holds was made by Captain Rikkers acting for charterer. All cargo compartments and adjacent decks areas were examined and were found in general good order and condition. The hull, deck machinery, hatch covers, etc. appeared to be in good repair and to have been well maintained. Prior to loading, the charterer erected a non-watertight wooden bulkhead between numbers 2 and 3 holds. Loading at Baltimore commenced on 12 December and was completed on 16 December; 2,000 tons of mill machinery, factory equipment and supplies were loaded in numbers 2 and 4 lower holds and 'tween decks with 224 tons of this amount being loaded on-deck and across numbers 2 and 4 hatches (there was no issue involving the on-deck cargo). The cargo was shipped under New York Navigation Company form Bill of Lading.

At Baltimore bilge soundings were routine until 15 December 1966 when 18 inches were found in number 3 port bilge (the soil lines were more than 12 feet above water level). On the day before these soundings at Baltimore there was very heavy snow and rain requiring suspension of work and the carpenters were unable to close number 3 hatch. There were also 12 to 15 inch readings in number 1 and 18 inches in number 5 bilges. The bilge

readings at Baltimore were due to working the vessel with open hatches during snow and rain. The vessel sailed on 16 December for Tampa, Florida where she arrived on 22 December. At Tampa the vessel on 22 and 23 December, after a further survey of the holds, loaded in numbers 1, 3 and 5 lower holds and 'tween decks 6,996 tons of triple super phosphate in bulk for Korea. Pre-loading survey at Tampa was conducted by the National Cargo Bureau. After thorough inspection no moisture or traces of water could be found. There was no indication of any leaking. There was no smell of sewage. On 23 December 1966 the vessel sailed from Tampa for Korea via the Panama Canal. The vessel arrived at Cristobal, Canal Zone on 29 December for bunkers and repairs to the main engine necessitated by misalignment of a high pressure piston rod components and a fractured crosshead. Engine repairs commenced on 30 December under the supervision of the American Bureau of Shipping. Repairs were completed on 13 January 1967 and a certificate of seaworthiness was thereupon issued by the American Bureau of Shipping.

From Baltimore to Tampa bilge soundings were normal. At Tampa 25 tons fresh water were taken on board. The vessel sailed on the evening of 23 December for the Canal Zone with a mean draft of 26 feet 4 inches. Commencing on 24 December there were soundings in excess of 18 inches in number 3 port bilge. There were 2 inches on arrival Cristobal, C. Z. on the morning of the 29th and 38 inches in the afternoon while bunkering and taking on fresh water. At this time the master tasted the bilge water and found it fresh. Thereafter during the 14 day stay at the Canal Zone soundings were normal except on 6 and 7 January when fresh water was again taken on board. Trash was removed from number 3 port cargo hold bilge valve on 26 December and the bilge pump rods were repacked the next day. Further repairs were made on 28 January and 4

February 1967 when a broken disk guide was replaced, disk machined and ground in and rubber lining installed. Except as noted the number 3 port bilge soundings were normal during the time the vessel was at the Canal. At no time during the voyage were the soundings in the number 3 starboard bilge in excess of the depth of the bilge. The master reasoned that the soundings in number 3 port bilge were due to a back up of fresh water through the bilge system during and after the taking on of fresh water. He presumed it was coming from some place in the engine room, that he had the problem under control through maintenance work performed and pumping, and that he could continue the voyage safely from the Panama Canal. Neither the M ster nor the Chief Engineer nor any other vessel personnel made any report of any problem concerning leakage or pumping to the Company's supervisory staff, either during the previous foreign voyage, the previous inter-coastal voyage or the voyage in question until the vessel arrived at Moji.

On 13 January anchor was aweigh and vessel commenced transit of Panama Canal. During the 40-day trans-Pacific passage to Moji, Japan where the vessel intended to take bunkers, the weather was not unusually severe. Cargo holds were inspected by the Chief Officer to the extent permitted by the nature of the cargo stowage on 31 December 1966, 20 January and 3 and 13 February and found in good condition. The vessel arrived at Moji quarantine anchorage on 22 February. At the time of anchoring the vessel appeared to the master to be out of trim and down by the head. The chief mate again checked the cargo holds, entering number 3 hold. He found that the phosphate had settled along the forward bulkhead and the sides and that the surface of the phosphate on the periphery of the stow was wet. On further inspection sea water was found enter-

ing through a hole in the overboard discharge value of the sanitary line which entered the port after corner of number 3 lower hold from overhead. This hole, which was about 1¼" x ¼" in size, was located on the underside of the horizontal portion of the valve (inboard of the clapper in the valve). Number 2 lower hold was flooded to a depth of 13 feet so that much of the stow of cargo was submerged. It was also apparent that a large quantity of phosphate had been carried along with the water which had entered number 2 lower hold.

Shoreside assistance was obtained at Moji. A cement box was installed around the leaking valve. Under water inspections were made by divers. No cracked plate was found and no dents or damage were found in way of number 3 hold. No leakage through any of the shell plating or any source other than the sanitary line discharge valve was found after discharge at Iligan or after the return of the vessel to the United States. The vessel sailed from Moji on 26 February and arrived at Mokpo, Korea on 28 February. Discharge of phosphate into barges commenced shortly after arrival at Mokpo. On 18 March the vessel sailed for Moji where she called briefly for bunkers on 19 March, sailing again for Iligan on 20 March and arriving and docking at Iligan City on the evening of 26 March.

At Iligan the vessel was attended throughout the course of discharge by numerous representatives of all parties concerned. Except for the discharge valve on the port soil line in number 3 lower hold, the hull, deck machinery, hatch covers etc., were found to be in good repair and to have been well maintained. The port valve was brought on deck and examined by surveyors. The port clapper valve when inspected appeared sound externally, save the wasted area around the end of the seat where the holed wasted area had been built up by welding at Mokpo. The water and

fertilizer in number 3 lower hold had formed a slurry which had penetrated the temporary bulkhead between numbers 2 and 3 cargo compartments. Some of the cargo in number 2 lower hold was in good order and condition; some cargo was cleaned and repaired at Iligan; some cargo was abandoned as worthless and other cargo was returned to the United States for reconditioning and repair.

The foregoing statement of facts, fully supported by the record, establishes that prior to departure from Tampa en route from Baltimore to Iligan City, there was no indication of leakage from or apparent defect in the sanitary valve that failed, that the vessel had been well maintained and was in apparent good condition, that there had been no report from the vessel of any leakage from the sea into any cargo space and that numerous, frequent and recent inspections had disclosed nothing to the contrary. The findings of both Courts below that there was no wilful or wanton misconduct were clearly correct.

POINT II.

THERE IS NO CONFLICT OF DECISION.

Petitioners urge that the decision of the Court of Appeals in this case is in conflict with the principles of *The WILLDOMINO*, 272 U. S. 718 (1927), *The MALCOLM BAXTER, JR.*, 277 U. S. 323 (1928), and *Monarch SS Co., Ltd.* v. *Karlshamns Oljefabriker (A/B)*, [1949] A. C. 196 (House of Lords). There is no conflict.

Lack of due diligence, whether of the owner or the master, to furnish a seaworthy vessel does not abrogate the contract of carriage. *The MALCOM BAXTER, JR.*, 277 U. S. 323 (1928); *Kish* v. *Taylor*, [1912] A. C. 604 (House of Lords); *Royal Ins. Co., Ltd.* v. *United States*, 87 F. 2d 714 (2d Cir. 1937); *The TURRET CROWN*,

297 Fed. 766 (2d Cir. 1924); cert. den., 264 U. S. 591; *The CALEDONIER,* 31 F. 2d 257 (2d Cir. 1929); cert. den., 279 U. S. 865; *The WAALHAVEN,* 36 F. 2d 706 (2d Cir. 1929); Cert. den., 281 U. S. 747. In *United States* v. *Wessel, Duval & Co.,* 115 F. Supp. 678 at 684 (S. D. N. Y. 1953), the court restated the rule:

> The United States is therefore left only with the claim that failure to use due diligence to make the ship seaworthy can amount to a deviation. Nothing like such conduct on the part of a carrier has ever been given the effect of deviation. The farthest that I have found the courts going away from the original conception of a departure from the ship's route is their acceptance of a breach of contract for special stowage of cargo as a deviation.

In *The WILLDOMINO, supra,* inexcusable deviation was found by reason of geographical departure from an ordinary, intended course necessitated by the *wilful* action of the owners in directing sailing with a known insufficiency of fuel for that voyage. There was no such wilful action in the present case. In *The MALCOLM BAXTER, JR., supra,* where it was held that departure from the voyage described in the bill of lading due to unseaworthiness resulting from lack of due diligence was not voluntary and was excusable, the Court distinguished *The WILLDOMINO* on the ground that the knowledge and intent on sailing to deviate, found in *The WILLDOMINO,* was not present. *Kish* v. *Taylor, supra,* is in accord. Both *Kish* v. *Taylor* and *The MALCOLM BAXTER, JR.,* were cited with approval in *Monarch SS Co., Ltd.* v. *Karlshamns Oljefabriker (A/B), supra,* where Lord Porter said, [1948] A. C. at page 212:

> Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable

> deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing.

In the present case, as the Court of Appeals indicated, the findings that Weyerhaeuser neither knew or must have known of the unseaworthiness and that there was no wilful and wanton misconduct dictated the result that was reached. The further discussion by the Court below of gross negligence was not necessary to its decision. There was no indication, however, that the Court intended any modification of the doctrine that a party remains fully liable for the consequences of wilful and intentional misconduct. There was no statement that the rule established in this Court and followed by the Courts below as to such conduct should be modified. As in *Royal Ins. Co.* v. *United States,* 87 F. 2d 714 (2d Cir. 1937), on which the Court of Appeals relied, where it was said at page 716 that for all practical purposes "gross negligence" amounts to the same thing as "deliberate intention", consideration of gross negligence is unnecessary. The Courts below, rather, were concerned with the difficulties in defining and applying varying degrees of negligence, citing Prosser, Torts, § 34 (4th ed. 1971). As to extension of the principle of "quasi-deviation "generally, see Gilmore & Black, Admiralty, § 3-42 at 182 (2d ed. 1975).

POINT III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

There is in this case only a matter of factual determination and the application of established principles of law relating to limitation of liability for lack of due diligence to $500 per package of cargo.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 7, 1975

SUPREME COURT, U. S. THE
APR 15 19

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT NEW YORK NAVIGATION COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT NEW YORK NAVIGATION COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court of the Southern District of New York is reported at 372 F. Supp. 859 and appears in Petitioners' Appendix A. The opinion of the Court of Appeals as modified is reported at 507 F. 2nd 68 and appears in Petitioners' Appendix C. The Order of the Court

of Appeals modifying its opinion on rehearing appears in Petitioners' Appendix D. The Order of the Court of Appeals denying a rehearing *en banc* appears in Petitioners' Appendix E.

Jurisdiction

Respondent New York Navigation Company, Inc. agrees with Petitioners' jurisdictional statement. No issue is presented on this point.

Statement of Facts

Petitioners' statement of facts is so inadequate that we find it necessary to state them more fully.

On July 11, 1966, New York Navigation agreed with Iligan to provide a sufficient number of "suitable and seaworthy vessels" to transport materials to be shipped by Petitioners from U.S. ports to Iligan City, Republic of Philippines, at agreed freight rates. The written agreement provided further that New York Navigation's standard form of bill of lading was to be used on all shipments and was to be stamped subject to the said agreement.

New York Navigation, in turn, time-chartered the vessel in suit from Weyerhaeuser at a monthly rate, on a New York Produce Exchange Form Time-Charter, dated September 7, 1966. This form of agreement in turn provided that the vessel was to be "tight, staunch, strong and in every way, fit for the service", and the owners would "maintain her in Class and keep the vessel in a thoroughly efficient state. . . ."

The bill of lading issued to Iligan by New York Navigation Company on its standard form was dated December 16, 1966, and Paragraph 1 thereof incorporated the U.S. Carriage of Goods by Sea Act. Clause 2 provided that the word "carrier" as used in the bill of lading, "shall include the ship, the owners, . . . and if bound thereby, the time-charterer." Clause 17 contained a $500 package limitation substantially similar to the one found in the U.S. Carriage of Goods By Sea Act, 46 U.S.C. §1304(5), hereinafter COGSA.

Before the commencement of the charter party, New York Navigation appointed National Cargo Bureau to survey the vessel at Baltimore. The vessel was found in class in all respects and the vessel was accepted on charter. Only two months before the vessel had undergone U.S. Coast Guard and American Bureau of Shipping surveys at Portland, Oregon.

The shipment in question was stowed in No. 2 and No. 4 holds of the S.S. JOHN WEYERHAEUSER. A total of "1087 packages" of cargo was loaded. The cargo was described in 17 riders attached to the bill of lading.

The loading and stowage of the shipment was also approved by the National Cargo Bureau at Baltimore.

The vessel sailed from Baltimore on the night of December 16, 1966, bound for Tampa, Florida, and arrived on December 22, 1966. Hatches Nos. 1, 3, and 5, were inspected by National Cargo Bureau surveyors and approximately 7,000 tons of triple superphosphate in bulk was loaded. The holds, prior to loading, were found to be absolutely dry. Had there been a hole at that time in the sanitary line, which passes through the hold, waste from the toilets and sinks up above would have been evident to the inspectors and longshoremen. The vessel sailed from Tampa on De-

cember 23, 1966, and next called at Cristobal, Panama, on December 29, 1966, in order to bunker.

At Panama, the vessel also underwent engine repairs until January 12, 1967. During the period of time that the vessel's engines were being repaired, the vessel was off hire. There was a problem in No. 2 and No. 3 holds. No reports were made to the charterer of any leakage.

The vessel proceeded towards Moji, Japan, to replenish her fuel oil and water before proceeding to Mokpo, Korea, to discharge the triple superphosphate. The vessel arrived at Moji on February 22, 1967, and the Chief Officer read the draft, which was greater than anticipated, and after inspections of the hatches, sea water was found in No. 2 and No. 3 holds.

Weyerhaeuser then arranged for an American Bureau of Shipping surveyor to attend and a leak was found in the port side sanitary storm valve in No. 3 lower hold. The storm valve is attached to the vessel's sanitary line which discharges overboard. It is fitted with a check valve to prevent sea water from entering the line and to permit the sanitary line to be pumped overboard. The check valve was found "frozen" in the open position and the body of the valve was found to be "wasted" from the inside. A hole, approximately two inches by one quarter inch had developed, which permitted sea water to enter into the lower hold of the ship.

Temporary repairs were conducted to the satisfaction of the American Bureau of Shipping surveyor and after a check by divers of the underwater portion of the hull, the vessel was permitted to proceed on its voyage.

During the voyage from Moji, to Mokpo, the storm valve was found leaking again, and at Mokpo, another American Bureau of Shipping surveyor attended on board and further repairs were conducted. After discharging the triple superphosphate, the vessel sailed for Iligan City and arrived on March 26, 1967.

On March 27, 1967, after Iligan and the owners had each appointed attorneys and surveyors, No. 2 hatch was opened. The surveyors thereafter attended to the damaged cargo.

When the vessel returned to the West Coast of the United States, the storm valve was removed from the vessel and sent to metallurgists for analysis. The valve was also examined by Weyerhaeuser supervisory personnel and all agreed that the inside of the valve was wasted which caused a hole to develop. Except for the hole which had developed from the inside, the outside of the valve looked all right.

Numerous witnesses were produced both at depositions and at trial in reference to the circumstances surrounding the entry of the sea water with particular emphasis being placed on the knowledge or lack of it on the part of the owners or the charterers of the S.S. WEYERHAEUSER in reference to this problem. There was no evidence that anyone had ever observed a leak in the valve before the voyage in suit began.

Lower Court Decisions

This action was brought in the United States District Court for the Southern District of New York, Iligan Steel Mills, Inc., et al., against Weyerhaeuser Company, owners of the S.S. JOHN WEYERHAEUSER, and against New York

Navigation Company, Inc., charterers of said vessel, to recover $3,000,000 for wetting, rusting, contamination, leakage and shortage of packages of steel and electrical products shipped by Iligan from Baltimore, Maryland and consigned to Petitioners, at Iligan City, Republic of the Philippines.

This action was originally assigned to the late Honorable Edward C. McLean and a three and one half day trial was held in July, 1972, before Judge McLean. Judge McLean died a short time later, before rendering an opinion, but after all the evidence and briefs were in.

The case was reassigned to the Honorable Robert J. Ward, and under a Stipulation entered into and signed by all parties, it was agreed that the case would be decided on the record as made before Judge McLean. Judge Ward decided the case in March, 1974, after reviewing and considering the record for over a year and after hearing extensive oral arguments in February, 1974.

The relevant holdings in the District Court will be discussed below, along with the affirmance of the District Court opinion, by the U.S. Court of Appeals for the Second Circuit.

Questions Presented

We shall consider the "QUESTIONS PRESENTED" as they appear in the petition below under "ARGUMENT".

Argument

Petitioners have gone to great lengths to spell out five issues that they believe to be of primary importance to the shipping industry as a whole. The questions, as urged by Petitioners, involve fraud, willful misconduct, gross negligence, deviation and the applicability of COGSA to non-carriers.

However, a reading of the decisions in the two lower Courts will clearly set the questions presented by Petitioners in proper perspective. Neither Court found any evidence of fraud, willful misconduct, gross negligence or deviation. The issues boil down to only one of whether the Respondents are entitled to the benefit of the $500 per package limitation provided by the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(5), in light of the lower Courts' holdings that the shipowner's failure to exercise due diligence to make the vessel seaworthy and the charterers' failure to furnish a seaworthy vessel as New York Navigation contractually warranted to do, in the July 11, 1966 agreement.

POINT I

The two decisions below found that Iligan did not sustain its burden of proof in showing gross negligence or such willful and wanton misconduct so as to constitute an unreasonable deviation that would displace the contract of carriage.

Petitioners in their Petition present a series of questions all based on the premise that the factual conclusions in the lower courts supported findings of fact that the Weyerhaeuser Company was guilty of deliberate, intentional, willful and wanton misconduct. This premise, apparently assumed by Petitioners, is not supported at all by the record, witnesses' testimony or by the holdings of either the District Court or the Court of Appeals.

The District Court, after carefully reviewing all the witnesses' testimony, exhibits and depositions for over one year, concluded that the ship was unseaworthy in Cristobal because of the wasted clapper valve, but that the Master did not, in Cristobal or any time prior to Cristobal, have knowledge of the actual defect in the ship.

Judge Ward, after reviewing the testimony and facts of the case in detail, wrote as follows:

> "In the judgment of this Court, Plaintiff has not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship." 372 F. Supp. at 865.

The District Court fully realized that Petitioners were asking the Court to carve out a new category in the law of maritime deviation. Judge Ward made the following comment after rejecting Petitioners' legal argument:

> "This is admittedly a novel theory, and this Court is not prepared *on the facts before it* so to extend the concept of deviation." (Emphasis added.) 372 F. Supp. 865-866.

Once the District Court found that Petitioners had failed to meet their burden of proof on their "novel theory", Petitioners' legal arguments became moot.

However, Iligan continued to press for an award of full damages based on what the District Judge termed "a novel theory" by taking the District Court decision on appeal to the Court of Appeals for the Second Circuit.

Despite the lack of factual basis, Iligan pressed its effort to have a court hold that gross negligence was a new kind of unreasonable deviation. The Court of Appeals noted that the dicta in their opinion was an exercise in order to clarify the extension of non-geographic (quasi) deviation cases in future cases and was not applicable to the case at bar. 507 F. 2d at 70.

Judge Friendly immediately noted that Petitioners' theory was "premised on a factual claim that the owner was on notice of the defect before the voyage began". 507 F. 2d at 70. Judge Friendly stated that this was a necessary finding of fact before any legal conclusions could be reached on Iligan's theory of full liability.

The Court of Appeals held, after reviewing the testimony, evidence, exhibits and briefs, that Petitioners had not sustained their burden of proof to warrant such a finding of fact.

The Court of Appeals noted that Judge Ward had not committed any error in his conclusion that:

> "Plaintiff has not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship prior to the trans-Pacific voyage, 372 F. Supp. at 865, he did not decide what result a contrary conclusion would have demanded." 507 F. 2d at 70.

The Court of Appeals based this decision on the Second Circuit's interpretation of Rule 52(a) of the Federal Rules of Civil Procedure.

The Judges held unanimously that the District Court's finding of facts were supported by the record. This is a significant holding in that the Second Circuit has for a considerable period of time examined factual issues on its own, rather than be limited by the "unless clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure.

The divergence of the Second Circuit from the majority rule has been conspicuous since its definitive decision on the subject in *Mamiye Brothers* v. *Barber Steamship Lines, Inc., et al.,* 360 F. 2d 774, 776-778, *cert. denied* 385 U. S. 835 (1966). Despite comments that the Second Circuit has retrenched somewhat, see, for example, *Famous Knitwear Corporation* v. *Drug Fair, Inc.,* 493 F. 2d 251, 253, footnote 2 (4th Circuit, 1974) and *Wright & Miller, Federal Practice and Procedure,* Volume 9, §2590, P. 765, recent decisions, including the one at bar, would indicate that the Court below is as determined as ever to pursue its own way. This approach inevitably leads into forays into factual areas, normally beyond the scope of review except by the "clearly erroneous standard".

It is apparent that the Second Circuit is still following its own standard of review, as in the case at bar, Circuit

Judge Friendly, author of *Mamiye Bros.* v. *Barber Steamship Lines, Inc., supra,* notes:

> "Although we do not consider the Judge's conclusions to be in error, *even under this Circuit's standard for review . . . .*" (emphasis added), citing *Mamiye* (507 F. 2d at 70), and where it is noted that the decision of the fact-finder was:
>
> "protected in many circuits by the 'unless clearly erroneous' rule, see e.g. *Merritt* v. *Interstate Transit Lines,* 171 F. 2d 605, 608-609 (8th Cir., 1948); *Imperial Oil Co.* v. *Drlik,* 234 F. 2d 4, 10 (6th Cir.), *cert. denied,* 352 U.S. 941 (1956); *Pacific Tow Boat Co.* v. *States Marine Corp.,* 276 F. 2d 745, 752 (9th Cir., 1960) and enjoying great weight even in this one." 507 F. 2d at 72.

The fact remains that the Court of Appeals carefully reviewed the factual findings of the trial judge and without a doubt would have reversed the lower court's decision if the findings did not conform to their rigid standard of review. See *Nye* v. *A/S D/S Svendborg and D/S A.F. 1912 A/S,* 507 F. 2d 376 (2nd Cir., 1974), *cert. denied,* 43 U.S.L.W. 3473 (March 3, 1975).

As noted above, this case was decided by a trial judge who did not have the opportunity to view and judge the credibility of the live witnesses at trial. However, this argument is without merit as both the history and the explicit language of Rule 52(a), shows that the "clearly erroneous" test is applicable even though the trial judge has not had the opportunity to judge the credibility of the witnesses. *See, Lundgren* v. *Freeman,* 307 F. 2d 104 (9th Cir., 1962); *Leach* v. *Crucible Center Co.,* 388 F. 2d 176 (1st Cir., 1968).

In any event, the Second Circuit Court of Appeals has had the opportunity to review a case that was tried before one Judge, who died shortly after the record had been completed, and decided by a new district judge after a study of the record.

In *Deep Sea Tankers* v. *The Long Branch,* 258 F.2d 757 (2nd Cir., 1958), the Court of Appeals after reviewing the lower court's opinion, reversed. In reversing Circuit Judge Medina wrote:

> Since the opinion and findings below are based upon the cold record alone, without the benefit of seeing and hearing numerous witnesses who testified before Judge Goddard, and, as this Court has noted 'we have an eventual responsibility for the facts as well as the law'. *The Bellhaven,* 2nd Cir., 72 F. 2d 206, 209; *Thorne, Neale & Co.* v. *Reading Co.,* 2 Cir., 87 F. 2d 694, 696; *See also, The Secondbee,* 6 Cir., 102 F. 2d 577, 581, . . . (we) have made new findings of fact in accordance with the clear weight of the evidence." 258 F. 2d at 759-760.

It is submitted that the Court of Appeals either by means of their interpretation of Rule 52(a) or their holding of *Deep Sea Tankers* v. *Long Branch, supra,* were free to reverse the findings of fact in this case. However, after careful review, they concurred with the District Court's findings.

A reading of Point I of Respondent Weyerhaeuser's brief will clearly show that these findings of fact were fully supported by the record.

POINT II

The U.S. Supreme Court holding in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), is not applicable in this case because the limitation provisions including those found in COGSA were contractually binding upon both Iligan and New York Navigation.

Petitioners contend that the Court below made a clear mistake of law in not applying the holding of this Court in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), that the U.S. Carriage of Goods by Sea Act only applies to "carriers".

In the *Herd* case, the District Court and the Fourth Circuit held a stevedoring company liable for the full amount of damage caused when a crated press fell into the harbor during loading by the stevedores. The stevedores' contention that its liability was limited by the provision of COGSA and the applicable bill of lading provisions limiting liability to $500 per package was rejected. The Supreme Court reaffirmed and pointed out that COGSA provided "neither the carrier nor the ship" shall be liable in an amount exceeding $500.00 per package. In the Court's opinion, neither the language nor the history of the Act indicated "an intent" to regulate third parties liability.

The *Herd* Court concluded that the stevedore's liability was not limited because no statute limited it and because the stevedore "was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by the contract". 359 U.S. at 308.

However, since that holding a number of courts have held that under certain circumstances, parties to a contract may limit an agents', stevedores' or other third party's liability even though they are not a "carrier", by clearly expressing the intent to do so. In other words, a third party may "benefit" from a contract of carriage by incorporation. See *Bernard Screen Printing Corp.* v. *Meyer Line,* 464 F. 2d 934, 936 (2nd Cir., 1972), *cert. denied,* 410 U.S. 910 (1973); *Secrest Machine Corp.* v. *S.S. Tiber,* 450 F. 2d 285, 286 (5th Cir., 1971); *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line,* 494 F. 2d 476, 478 (9th Cir. 1974); *Cabot Corp.* v. *S.S. Mormacscan,* 441 F. 2d 476, 478 (2nd Cir., 1970), *cert. denied,* 404 U.S. 855 (1971); *Carle & Montonari, Inc.* v. *American Export Isbrandtsen Lines, Inc.,* 386 F. 2d 839 (2nd Cir., 1967), *cert. denied,* 390 U.S. 1013 (1969).

In the case at bar, the District Court held that the controlling contract between Iligan and New York Navigation was the Agreement of July 11, 1966. Clause 11 of the Agreement stipulated that the bill of lading controlled the loading and transportation of the cargo to be shipped. 372 F. Supp. 869. The District Court held that contractually, the provisions of COGSA were incorporated into the bill of lading and thereby into the Agreement and the parties had effectively limited New York Navigation's liability by such incorporation. 372 F. Supp. 871.

Therefore, the *Herd* decision is clearly not relevant in this instance, in that in the case at bar, both courts below found that *contractually* New York Navigation had afforded itself the protection of the $500 limitation by the incorporation of both the statutory provisions of the U.S. Carriage of Goods By Sea Act and the similar contractual limitations found in Clause 17 of New York Navigation's bill of lading.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION

The briefs of respondents Weyerhaeuser Company ("Weyerhaeuser") and New York Navigation Company, Inc. ("New York Navigation") are inaccurate in several important factual assertions, in violation of Supreme Court Rules 24 and 40. There is a reason why these briefs contain no references to the record.

The Courts below found as facts:

1. The vessel was unseaworthy at the beginning of the voyage (A-18)* because of a clapper valve which corroded

* These references are to the appendix in the petition.

over a long time (A-6, A-10). The valve was frozen in an open position because the lugs were completely corroded (A-6).

2. Long before the instant voyage, the Master knew of abnormal bilge readings in #3 hold (A-8).

3. The Master reported the problem to his marine superintendent in Portland (A-10) long before the instant voyage.

4. The marine superintendent read the log books after each voyage (A-10), and knew of the leak in that way.

5. The shoreside officers of Weyerhaeuser knew there was an unusual problem (A-11) of excessive water entry in #3 hold (A-18), and that it wasn't a feedback of fresh water (App. 121)*, or a leaking ship's plate (App. 120).

6. The bilge readings were abnormally high in #3 hold in Baltimore before petitioner's cargo was loaded (A-7).

7. The ship was clearly unseaworthy in Cristobal because of the corroded clapper valve in #3 hold on the port side. (A-7, A-10, A-17).

8. The readings were very high in #3 hold when the ship was loaded and the valve was under the sea. (A-5, A-10).

9. The Master's explanations concerning the conditions at Cristobal were implausible. (A-10).

10. Petitioner's cargo in #2 hold was not yet damaged at Cristobal. (A-6, A-10).

These findings of the Courts below are *all supported by the record*, whereas the allegations in the responsive briefs are unsupported.

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* Exhibit volume.

Weyerhaeuser at page 9 and New York Navigation at page 3 refer to an inspection of the ship at Baltimore by a Captain Rikkers. This person was in the Courtroom during the trial but was not made a witness, either live or by deposition. Nor was his alleged survey report placed in evidence.

On pages 8 and 11, Weyerhaeuser states that no vessel personnel reported any leakage problem in #3 hold to the supervisory staff. The record is otherwise and the Courts below have so found. (A-10).

Clearly erroneous, and contradictory are the following findings of the Courts below:

1. That petitioner failed to prove Weyerhaeuser knew, or must have known the ship was unseaworthy. The findings set forth above contradict this finding.

This Court has held that "a ship that leaks is unseaworthy; *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 213, 83 S. Ct. 1185, 1190, 10 L. Ed. 2d 297, 303 (1963).

THE COURTS BELOW HAVE FOUND THAT WEYERHAEUSER KNEW THE SHIP WAS UNSEAWORTHY BECAUSE THEY FOUND IT KNEW SHE LEAKED; THEY HAVE ALSO HELD WEYERHAEUSER DIDN'T KNOW SHE WAS UNSEAWORTHY. THESE FINDINGS ARE INCOMPATIBLE AND THE DECISION BELOW RESTS UPON CLEAR ERROR.

Everybody knew the ship had lost its watertight integrity except shipper, Iligan. To hold cargo owners had to show Weyerhaeuser knew the valve was the cause of the leak is an impossible burden where the shipowner refuses to be bothered.

The shoreside officers knew it wasn't a feedback of fresh water (App. 121), or a hole in a ship's plate (App. 120). The only other possible cause was the valve, an endemic problem in old Liberty ships and this one was 22 years old at the time. (A-4).

2. That there were routine annual inspections of the ship, with hamer testing of the valves. Because Weyerhaeuser did not produce a surveyor to identify the alleged certificates and testify about these alleged inspections, Judge McLean refused to allow them in evidence (Lower Court App. 623a, 345a, 346a). Judge Ward knew this (A-9). *They are not in the record as evidence.*

3. That petitioner did not prove Weyerhaeuser "must have" known the valve was holed. Judge Ward found that Weyerhaeuser knew that #3 hold leaked (A-10, A-11, A-18), and that an inspection would have revealed the specific cause (the deteriorated valve) (A-10), and the owner was on notice of the problem (A-10). In view of these findings, Judge Ward's conclusion is clearly erroneous. The record is clear that Weyerhaeuser "should have known" the valve was the cause. This is the foundation for the question left open by this Court in *The Malcolm Baxter, Jr.* (Petition pp. 9-10) and decided against the shipowner in *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker (A/B).* (Petition, p. 10).

The Circuit Court's holding that even wilful conduct, or gross negligence in supplying a known unseaworthy ship will not void the contract is not dictum. It recognized the weaknesses in the District Court's opinion, and therefore, made a far reaching determination that it intends should control all future similar cases. (C-5, C-8).

The decision of the Court of Appeals is abhorrent to common sense, and a far cry from the public policy of this

country that only seaworthy ships should be sent to sea. *The Caledonia*, 157 U.S. 124, 133, 15 S. Ct. 537, 541, 39 L. Ed. 644, 647 (1894).

The requirement originally was absolute. Upon the objection of shipowners that the burden was too onerous, the warranty was reduced by statutes to a duty to exercise due diligence, i.e., a shipowner was not to be liable for *latent defects* not discoverable before the voyage.

However, as these inroads developed, the Courts remained alert to the *essential requirement* that a ship should be seaworthy. Judge Learned Hand in *Metropolitan Coal Co.* v. *Howard*, (2 Cir. 1946) 155 F. 2d 780, 783-784, stated the public policy as follows:

> "the warranty of seaworthiness is a favorite of the admiralty and exemptions to it or limitations upon it, are narrowly construed."

Judge Ward found that the ship was leaking in Baltimore (A-18), and clearly leaking seawater at Cristobal (A-7, A-10, A-17). The Circuit Court did not mention Weyerhaeuser's conduct at Cristobal at all, despite the long-standing doctrine that the presence in a ship of seawater raises a presumption that the ship is unseaworthy. *Wessels* v. *The Asturias* (2 Cir., 1942) 126 F. 2d 999, 1001 following The Folmina, 212 U.S. 354, 29 S. Ct. 363, 53 L. Ed. 546 (1909).

The survey of the American Bureau of Shipping at Moji (Weyerhaeuser's Ex. P) shows the valve was leaking from the bonnet cover, plug, valve flange and valve body, and a 2" hole had been welded (Plaintiff's Exhibit 36; App. 61 photo).

Yet New York Navigation states at page 5 that after the incident "the outside of the valve looked all right." With a large weld, it did not look "all right".

Weyerhaeuser refers to the recent edition of Gilmore and Black, The Law of Admiralty (2nd Ed. 1975) Sec. 3-42 discussing the question of the extension of the deviation doctrine. In the same treatise at Sec. 3-41, page 180, in considering the possible effect of the provisions of the Carriage of Goods by Sea Act on the application of the deviation doctrine, the authors are careful to circumscribe their observations by reminding the reader that COGSA was not intended as a complete code of law with respect to the carriage of goods by sea, but only a set of compulsory terms to be read into bills of lading. (ibid, page 172). Thus, the provisions of COGSA may not be used to provide relief which was not previously available to a carrier because of its breach of an essential part of the contract. The authors contend that the deviation doctrine should not apply unless there is a causal connection between the damages and the deviation. It is noted by the writers that their thesis is not affected by the holding in *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953) since there was such a causal connection. In the instant case also there is no question of causal connection.

In no Circuit does the "clearly erroneous" doctrine of Federal Rule of Civil Procedure 52(a) apply where the lower Court saw no live witness. The Circuit Court has, as stated by Judge Medina in *Deep Sea Tankers* v. *The Long Beach* (2 Cir. 1958) 258 F. 2d 757, 759-760, "an eventual responsibility for the facts as well as the law."

It is basic that determinations of negligence, or lack of negligence are conclusions of law that are not covered by Federal Rule of Civil Procedure 52(a) *Mamiye Bros.* v. *Barber Steamship Lines, Inc.* (2 Cir., 1966) 360 F. 2d 774, 776; *Director General of India Supply Mission* v. *SS MARU* (2 Cir., 1972) 459 F. 2d 1370, 1373 (footnote).

It is clear that the Second Circuit did not study this record, for the record is replete with proof that Weyerhaeuser knew hold #3 was leaking before petitioner's cargo was stowed therein.

New York Navigation agrees that COGSA applies only to carriers and Iligan agrees it can be contractually incorporated by non-carriers.

In this case, a non-carrier, New York Navigation did not incorporate the COGSA or Clause 17 of the bill of lading, which refers only to the carrier. To hold that it did is error.

Should the Court of Appeals' decision be allowed to stand the public policy requiring seaworthy ships will have been perverted because shipowners will have virtual immunity in sending to sea known unseaworthy vessels.

The permissive decision below invites disaster. It should be promptly reversed.

CONCLUSION

Petitioners respectfully request this Honorable Court to accept the petition.

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